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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an alien found removable because of his criminal conviction for an aggravated felony (a drug trafficking crime), applied for discretionary relief from removal. The Board of Immigration Appeals (BIA) concluded that he was ineligible for discretionary relief under 8 U.S.C. 1182(c) (1994) because that provision had been repealed. Respondent filed a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241, contending that Congress's repeal of Section 1182(c) did not apply to his conviction, which was entered before Section 1182(c) was repealed, even though his removal proceedings were commenced after the repeal became effective. The lower courts agreed and granted habeas corpus.

The questions presented are:

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the BIA properly concluded that respondent is not eligible for discretionary relief under Section 1182(c) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
1. Statutory background	2
a. Pre-AEDPA law	2
b. AEDPA	3
c. IIRIRA	7
2. Proceedings below	9
Reasons for granting the petition	17
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adenji v. *Perryman*, No. 00-5375 (Oct. 30, 2000)	6
Alanis-Bustamante v. *Reno*, 201 F.3d 1303 (11th Cir. 2000)	20
Alfarache v. *Cravener*, 121 S. Ct. 46 (2000)	6
Bowrin v. *INS*, 194 F.3d 483 (4th Cir. 1999)	5
Bugajewitz v. *Adams*, 228 U.S. 585 (1913)	28
Calcano-Martinez v. *Reno*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000)	10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984)	17, 28
De Horta-Garcia v. *United States*, 121 S. Ct. 82 (2000)	6
DeSousa v. *Reno*, 190 F.3d 175 (3d Cir. 1999)	6
Felker v. *Turpin*, 518 U.S. 651 (1996)	12
Finlay v. *INS*, 210 F.3d 556 (5th Cir. 2000)	20
Flores-Miramontes v. *INS*, 212 F.2d 1133 (9th Cir. 2000)	19

Cases—Continued: Page

Foti v. *INS*, 375 U.S. 217 (1963) 21, 23
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 3
Galindo-Del Valle v. *Attorney General*, 213 F.3d 594 (11th Cir. 2000), petition for cert. pending, No. 00-362 29
Galvan v. *Press*, 347 U.S. 522 (1954) 28
Garnica-Vasquez v. *Reno*, 210 F.3d 558 (5th Cir. 2000) 20
Goncalves v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999) 5, 6
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 28
Heikkila v. *Barber*, 345 U.S. 229 (1953) 21
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999) 5, 6
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 28
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 27
INS v. *Yang*, 519 U.S. 26 (1996) 26
Jay v. *Boyd*, 351 U.S. 345 (1956) 26
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000) 5, 6
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000) 5, 6
Landgraf v. *USI Film Products*, 511 U.S. 244 (1994) 15
Lechuga v. *Perryman*, 121 S. Ct. 299 (2000) 6
Liang v. *INS*, 206 F.3d 308 (3d Cir. 2000) 19
Mahadeo v. *Reno*, 226 F.3d 3 (1st Cir. 2000) 19
Mahler v. *Eby*, 264 U.S. 32 (1924) 28
Magana-Pizano v. *INS*, 200 F.3d 603 (9th Cir. 1999) 5
Marcello v. *Bonds*, 349 U.S. 302 (1955) 28
Mattis v. *Reno*, 212 F.3d 31 (1st Cir. 2000) 5
Max-George v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280 19

Cases—Continued: Page

Mayers v. *INS*, 175 F.3d 1289 (11th Cir. 1999) 5
Morales-Ramirez v. *Reno*, 209 F.3d 977 (7th Cir. 2000) 28
Pak v. *Reno*, 196 F.3d 666 (6th Cir. 1999) 5
Perez v. *Reno*, 227 F.3d 294 (5th Cir. 2000) 20
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 12, 22, 27
Requena-Rodriguez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999) 5, 6
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000) 20
Russell v. *Reno*, 216 F.3d 1091 (11th Cir. 2000), petition for cert. pending, No. 00-5970 20
Sandoval v. *Reno*, 166 F.3d 225 (3d Cir. 1999) 5
Shah v. *Reno*, 184 F.3d 719 (8th Cir. 1999) 5
Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 21
Smith v. *Reno*, 121 S. Ct. 81 (2000) 6
Soriano, In re, Interim Dec. No. 3289, 1996 WL 426888 (A.G. Feb. 21, 1997) 4
Stone v. *INS*, 514 U.S. 386 (1995) 21, 24
Tasios v. *Reno*, 204 F.3d 544 (4th Cir. 2000) 5
Turkhan v. *Perryman*, 188 F.3d 814 (7th Cir. 1999) 6
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 22
United States v. *Fausto*, 484 U.S. 439 (1987) 22
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 (1868) 12

Constitution, statutes and regulation:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension Clause) 2, 25, 26, 98a
Amend. V (Due Process Clause) 16
Act of Oct. 11, 1996, § 2, 110 Stat. 3657 8
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
§ 401(e), 110 Stat. 1268 ..... 2, 4, 21, 24, 110a

Statutes and regulation—Continued: Page

§ 440, 110 Stat. 1276 ..... 2, 4, 110a
§ 440(a), 110 Stat. 1276 4
§ 440(d), 110 Stat. 1277 ..... 3, 5, 6, 29
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998) 3, 21
Illegal Immigration Reform and Immigrant Responsibility Act of 1966, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 2, 110a
§§ 301-308, 110 Stat. 3009-575 14
§ 304, 110 Stat. 3009-575 ..... *passim*
§ 304(b), 110 Stat. 3009-597 ..... 2, 10, 112a
§ 306, 110 Stat. 3009-607 8
§ 306(b), 110 Stat. 3009-612 8
§ 308(b)(6), 110 Stat. 3009-615 7
§ 309, 110 Stat. 3009-625 ..... 2, 112a
§ 309(a), 110 Stat. 3009-625 ..... 8, 14, 15, 27
§ 309(c), 110 Stat. 3009-625 8
§ 321, 110 Stat. 3009-627 15
§ 322, 110 Stat. 3009-628 15
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* (1994 & Supp. IV 1998):
8 U.S.C. 1101(a)(43) 3
8 U.S.C. 1101(a)(43)(B) 9
8 U.S.C. 1103(a)(1) (Supp. IV 1998) 28
8 U.S.C. 1105a (1994) 8
8 U.S.C. 1105a(a) (1994) 2, 3, 21, 98a, 99a
8 U.S.C. 1105a(a)(10) (1994) 3, 4, 8, 22, 24
8 U.S.C. 1182(c) (1994) ..... *passim*
8 U.S.C. 1225(b) (Supp. IV 1998) 2, 101a
8 U.S.C. 1225(b)(1) (Supp. IV 1998) 7, 22
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 4
8 U.S.C. 1228(b) (Supp. IV 1998) 7
8 U.S.C. 1229 (Supp. IV 1998) 7
8 U.S.C. 1229a (Supp. IV 1998) 7
8 U.S.C. 1229b (Supp. IV 1998) 7, 10

Statutes and regulation—Continued: Page

8 U.S.C. 1229b(a) (Supp. IV 1998) 2, 105a
8 U.S.C. 1229b(a)(3) (Supp. IV 1998) 7
8 U.S.C. 1229b(b)(1)(C) (Supp. IV 1998) 7
8 U.S.C. 1251(a)(2)(A)(iii) (1994) 4
8 U.S.C. 1252 (Supp. IV 1998) 2, 8, 9, 22, 23, 25, 105a
8 U.S.C. 1252(a)(1) (Supp. IV 1998) 8, 21, 22, 25
8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) 8, 11, 12, 13, 19, 23, 25
8 U.S.C. 1252(b)(1) (Supp. IV 1998) 22, 24
8 U.S.C. 1252(b)(6) (Supp. IV 1998) 24
8 U.S.C. 1252(b)(9) (Supp. IV 1998) 8, 12, 22, 25
8 U.S.C. 1252(e)(2) (Supp. IV 1998) 7, 22
8 U.S.C. 1252b (1994) 7
28 U.S.C. 2241 (1994 & Supp. IV 1998) ..... *passim*
8 C.F.R. 3.14(a) 9

Miscellaneous:

65 Fed. Reg. 44,478 (2000) 6
H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) 21

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-39a)[1] is not yet reported. The opinion and judgment of the district court (App. 74a-93a) are reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals (App. 94a-95a) and the immigration judge (App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 98a-114a) are pertinent provisions of the Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276 (enacted Apr. 24, 1996); Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996); and Section 2241 of Title 28, United States Code.

STATEMENT

1. ***Statutory Background.***

This case presents questions about the application and, potentially, the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. *Pre-AEDPA Law.* Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could

apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) (see 8 U.S.C. 1101(a)(43) (1994)), he had not served a term of imprisonment of five years or longer for that conviction. See 8 U.S.C. 1182(c) (1994).[2] If the Attorney General, in the exercise of her discretion, denied relief from deportation, then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. *AEDPA.* In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section—including aliens who were deportable because they had been convicted of aggra-

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[2] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, the Second Circuit held in *Francis* v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country must also be given the opportunity to apply for relief from deportation under Section 1182(c). The Attorney General acquiesced in that decision.

vated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998))).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277 (adding a new 8 U.S.C. 1105a(a)(10)). At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the bar to granting discretionary relief under 8 U.S.C. 1182(c) (1994) that was enacted in AEDPA Section 440(d) applied to all deportation proceedings pending on the date of AEDPA's enactment, including those in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241 to review their deportation orders. The courts of appeals divided as to whether the district courts retained habeas corpus jurisdiction to entertain such challenges to final orders of deportation, or whether (as the government contended) AEDPA had deprived the district courts of such jurisdiction and instead provided that, to the extent any judicial review of deportation orders might remain available for aliens convicted of aggravated felonies, the courts of appeals had exclusive

authority to entertain such challenges.[3] The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d).[4]

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[3] The majority of the circuits concluded that, after AEDPA, the district courts retained habeas corpus jurisdiction to entertain statutory and constitutional challenges to deportation orders against criminal aliens. See *Goncalves* v. *Reno*, 144 F.3d 110, 118-126 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-489 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 670-673 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 607-609 (9th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000); *Mayers* v. *INS*, 175 F.3d 1289, 1295-1300 (11th Cir. 1999). The Seventh Circuit, by contrast, concluded that AEDPA barred district courts from exercising that jurisdiction. See *LaGuerre* v. *Reno*, 164 F.3d 1035, 1040-1041 (1998), cert. denied, 120 S. Ct. 1157 (2000).

[4] The First, Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits concluded that AEDPA Section 440(d) did not bar relief under 8 U.S.C. 1182(c) (1994) for aliens whose deportation proceedings were commenced before AEDPA was enacted. See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 129-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675-676; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304. The Fourth Circuit held that AEDPA Section 440(d) did not bar relief for an alien who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted, even if that alien was placed in deportation proceedings after AEDPA's enactment. See *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000). The Second Circuit agreed with that conclusion in the decision below in this case. App. 31a-32a. The First and Ninth Circuits held that, although AEDPA Section 440(d) generally barred relief for aliens convicted before AEDPA was enacted but placed in proceedings after its enactment, it would not bar relief if an alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under Section 1182(c). See *Mattis* v. *Reno*, 212 F.3d 31, 37 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. The Third, Fifth, and Tenth Circuits, by

The government and several aliens filed petitions for a writ of certiorari, asking this Court to decide whether the district courts retained habeas corpus jurisdiction after AEDPA to entertain challenges to deportation orders and to resolve the temporal reach of AEDPA Section 440(d). In the interim, however, Congress had enacted another sweeping change to the INA, in IIRIRA. The IIRIRA carried forward and recast from AEDPA the preclusion of judicial review in cases involving aggravated felons and also refashioned the statutory scheme governing discretionary relief, including the bar to relief for aggravated felons. Accordingly, this Court denied review of the petitions raising issues arising only under AEDPA, remitting to a later date related issues in cases arising under IIRIRA.[5] This is such a case.

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contrast, held that AEDPA Section 440(d) did bar relief for aliens who were convicted before AEDPA was enacted but were placed in deportation proceedings after its enactment. *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 307-308; *Jurado-Gutierrez*, 190 F.3d at 1149-1152. And the Seventh Circuit held that AEDPA Section 440(d) barred relief even for aliens who were already in deportation proceedings when AEDPA was enacted. *Turkhan* v. *Perryman*, 188 F.3d 814, 827 (7th Cir. 1999); *LaGuerre*, 164 F.3d at 1040-1041.

In light of that conflict in the circuits, as well as this Court's denial of certiorari in several cases presenting the temporal scope of AEDPA Section 440(d), the Attorney General recently issued for notice and comment a proposed rule that would acquiesce in the decisions of those circuits that have concluded that AEDPA Section 440(d) does not bar relief for an alien who was placed in deportation proceedings before AEDPA was enacted. See 65 Fed. Reg. 44,478 (2000). The Attorney General would still apply AEDPA Section 440(d), however, absent adverse circuit precedent, to aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. *Ibid.*

[5] See *Adeniji* v. *Perryman*, No. 00-5375 (Oct. 30, 2000); *Lechuga* v. *Perryman*, 121 S. Ct. 299 (2000); *Alfárache* v. *Cravener*, 121 S. Ct. 46 (2000); *Smith* v. *Reno*, 121 S. Ct. 81 (2000); *De Horta-Garcia* v. *United States*, 121 S. Ct. 82 (2000); *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000); *Reno* v. *Navas*, 526 U.S. 1004 (1999); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999).

c. *IIRIRA.* On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders,[6] and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593.[7] As before, an alien convicted of an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998).

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. As under AEDPA, Congress provided that aliens convicted of aggravated felonies are ineligible for discretionary relief. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transitional rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new

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[6] IIRIRA also expressly repealed the old INA provisions setting forth the administrative procedures for deportation of aliens. See IIRIRA § 308(b)(6), 110 Stat. 3009-615 (striking old 8 U.S.C. 1252b (1994)).

[7] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. IV 1998), and for aliens not admitted for legal permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. IV 1998). Congress provided for limited habeas corpus review in the district courts of immigration officers' removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. IV 1998); see also pp. 21-22, *infra*.

provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. In its stead, Congress enacted the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including an aggravated felony. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. ***Proceedings Below.***

a. Respondent is a native and citizen of Haiti who was admitted to the United States as a lawful permanent resident on June 17, 1986. On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pleaded guilty in Connecticut state court to the sale of a controlled substance. App. 3a. Under the INA, that offense constituted "illicit trafficking in a controlled substance," and was therefore an aggravated felony. See 8 U.S.C. 1101(a)(43)(B).

In 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based on his drug offense.[8] At his hearing before an immigration judge (IJ), respondent sought to apply for relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed as of April 1, 1997 (see pp. 7-8, *supra*). The IJ denied that application and ordered respondent removed to Haiti. App. 96a-97a. The BIA affirmed, concluding that respondent was not eligible for Section 1182(c) relief because that form of relief "is not available in removal proceedings,

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[8] The district court noted that the INS issued the Notice to Appear on April 10, 1997, served that Notice on respondent on July 10, 1997, and filed the Notice with the immigration court on July 23, 1997. App. 78a. The Attorney General's regulations provide that a removal proceeding is commenced when a charging document such as the Notice to Appear is filed with the immigration court by the INS. 8 C.F.R. 3.14(a). In any event, all three dates followed the full effective date of IIRIRA, and so respondent's proceeding was plainly commenced after IIRIRA took effect.

which respondent is properly in. Section [1182(c)] was repealed by section 304(b) of [IIRIRA] * * * and was replaced with cancellation of removal under * * * 8 U.S.C. § 1229b. The respondent is statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony." App. 95a.

b. Respondent then filed a petition for a writ of habeas corpus in district court. Respondent contended that, notwithstanding the repeal of the former Section 1182(c) and the fact that he was placed in removal proceedings under the new provisions of IIRIRA, rather than in deportation proceedings under the pre-IIRIRA provisions of the INA, he remains eligible to be considered for discretionary relief under Section 1182(c), and that the repeal of that provision was not to be applied "retroactively" to his case, which involves a criminal conviction entered before IIRIRA took effect. The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). The district court held that it had jurisdiction, ruled against the government on the merits, and granted habeas corpus, directing the BIA to entertain respondent's application for relief under the repealed Section 1182(c). App. 74a-93a.

c. The court of appeals affirmed. App. 1a-39a.

(i) The court first concluded (App. 5a-6a), based on its decision issued the same day in *Calcano-Martinez* v. *Reno*, Nos. 98-4033 et al., 2000 WL 1336611 (see App. 40a-73a), that the district court properly exercised jurisdiction over respondent's habeas corpus petition. As the court in this case summarized its holding in *Calcano*, IIRIRA did not "divest [the district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judi-

cial review is available." App. 6a. Here, the court continued, no other avenue of judicial review existed because respondent was convicted of an aggravated felony and was therefore barred by 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) from raising his claims by petition for review in the court of appeals. *Ibid.*

In *Calcano*, the same panel of the court of appeals ruled that, because of Section 1252(a)(2)(C), it lacked jurisdiction over direct petitions for review filed by three aliens, also convicted of aggravated felonies and found ineligible by the BIA for discretionary relief on that basis, raising the same retroactivity claim raised by respondent in this case. App. 48a-73a. The court followed prior decisions (see App. 48a-54a) holding that the courts of appeals were barred from considering any claims raised in direct petitions for review for review filed by aggravated felons, except to the extent that such petitions directly challenged the BIA's conclusion that the alien was removable because of an aggravated felony conviction, since that question determined whether the preclusion of removal in Section 1252(a)(2)(C) applies. See p. 12, *infra*.[9] But the court further held that the district courts retained habeas corpus jurisdiction to consider claims that are "purely legal in nature," including "constitutional challenges and claims that the Attorney General misinterpreted the immigration laws." App. 54a.

The court of appeals acknowledged in *Calcano* that the Fifth and Eleventh Circuits have held that Congress has "eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings." App. 57a. The court aligned itself (App. 59a-61a), however, with the Third and Ninth Circuits, which have ruled that "Article III courts

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[9] Respondent does not raise any such claim in this case: he does not contest that he is an alien, that he was properly found by the IJ and the BIA to be removable, and that the offense for which he was found removable was properly classified as an aggravated felony.

continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders," App. 60a, and that it is therefore unnecessary to read any exceptions into Section 1252(a)(2)(C), which "bars [the courts of appeals'] jurisdiction over petitions to review removal orders against aliens convicted of certain crimes," App. 61a.

In addition, the court in *Calcano* read this Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," App. 61a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," App. 62a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." App. 62a.[10] And, it stated, the contrary interpretation would "raise a serious constitutional question under the Suspension Clause," App. 68a, for it would leave respon-

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[10] In particular, the court rejected (App. 64a-68a) the government's reliance on Section 1252(b)(9), which expressly requires that judicial review of all legal and factual challenges to a removal decision be available only in the courts of appeals on review of a final removal order. The court acknowledged that this Court in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999), characterized Section 1252(b)(9) as an "'unmistakable zipper clause' that channels judicial review of all immigration-related decisions and actions to the court of appeals," App. 65a (quoting *AADC*, 525 U.S. at 483), but it suggested that Congress enacted Section 1252(b)(9) only for the purpose of "consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals," App. 66a, and not to foreclose any other avenue by which an alien might challenge his removal order, such as a collateral attack in district court by habeas corpus petition.

dent without a judicial forum for his challenge to the BIA's determination that it may not grant him relief under the repealed Section 1182(c).

Calcano also rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. App. 68a-69a. The government had submitted that, on petition for review, a court of appeals retains authority to entertain substantial constitutional claims, such as constitutional challenges to the INA itself, as well as challenges going to "jurisdictional facts," such as whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense," and who therefore falls within the preclusion of review in Section 1252(a)(2)(C). App. 68a. Even assuming that such review remains available in the court of appeals, the court believed that it would be insufficient to satisfy the Constitution, for, it stated, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." App. 71a.

The *Calcano* panel noted finally that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." App. 72a. But, the court stated (App. 72a-73a), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

(ii) On the merits, the court of appeals held (App. 6a-32a) that the repeal of Section 1182(c) by IIRIRA Section 304 could not be applied to an alien who pleaded guilty or nolo contendere to an aggravated felony before IIRIRA's enactment. In reaching that conclusion, the court purported to apply (App. 13a) the two-step analysis set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), for determining whether a federal statute applies to pre-enactment conduct:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

App. 13a.

The court first concluded, under the first prong of *Landgraf*, that Congress had not made clear whether the repeal of Section 1182(c) by IIRIRA Section 304 was to be applied to aliens who were convicted before Section 304's effective date. App. 14a-22a. It rejected the government's argument that, under the general "effective date" provision in IIRIRA Section 309(a), 110 Stat. 3009-625, all of the new rules added by Sections 301-308 of IIRIRA, including IIRIRA Section 304's repeal of Section 1182(c) and its substitution of cancellation of removal, must be applied together to aliens placed in removal proceedings on or after April 1, 1997. The

court found that submission contrary to this Court's statement in *Landgraf* (511 U.S. at 257) that an "effective date" provision does not dictate a statute's application to pre-enactment conduct. App. 16a. Although the court acknowledged that IIRIRA Section 309(a) is "arguably more direct than a typical effective date provision," it concluded that Section 309(a) "is not precise enough to mandate retroactive application of IIRIRA § 304 under the first step of the *Landgraf* inquiry." *Ibid.*[11]

The court then concluded, under the second step of the *Landgraf* analysis, that applying Section 304 in the cases of aliens who pleaded guilty before IIRIRA was enacted would have "an impermissible retroactive effect." App. 25a. Focusing on "the decision to enter a guilty plea to a crime * * * that qualifies the alien for removal under the immigration laws," the court agreed with respondent that "an alien charged with a crime making him eligible for deportation would factor the immigration consequences of conviction"—including "the availability of discretionary relief from removal"—"in deciding whether to plead or proceed to trial." App. 26a-27a (brackets and internal quotation

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[11] The court also contrasted (App. 17a-18a) Section 304 with other provisions in a different subtitle of IIRIRA (especially Sections 321 and 322), where Congress had expressly provided that the amendments were to be applied to convictions entered before the statute's enactment. The court rejected, however, respondent's contention that those other provisions' express directives required the court to conclude by negative inference that Section 304 applies only to post-enactment conduct. Those other provisions, the court stated, were "too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304." App. 21a n.5. In addition, the court stated, although the effective date provision in IIRIRA Section 309(a) did not dictate Section 304's application to pre-enactment conduct, it did "render [c]ongressional intent ambiguous." *Ibid.* Thus, the court "decline[d] to infer from this lack of guidance that Congress intended IIRIRA § 304 to apply only prospectively and [held] that Congress's intent as to the section's temporal reach is ambiguous." *Ibid.*

marks omitted). The court further remarked that, before AEDPA and IIRIRA were enacted, "an alien's reliance on the possibility of receiving a waiver of deportation was reasonable because there was a strong possibility that he or she would receive relief." App. 28a. Thus, the court maintained, under pre-AEDPA and pre-IIRIRA law, an alien charged with a deportable crime would "only decide to concede guilt to a crime that renders him or her removable in order to be eligible to apply for relief from removal," whereas "[u]nder the law today, this settled expectation is upset dramatically." App. 29a. Because Section 304 of IIRIRA, in the court's view, would "upset settled expectations were it applied retroactively to pre-enactment guilty pleas [and] * * * would attach new legal consequences to [an alien's] guilty plea to a removal crime," it would "have an impermissible retroactive effect" in such cases. *Ibid.*[12]

(iii) Judge Walker dissented from the court's ruling on the merits, and concluded that Congress had expressly prescribed that all of IIRIRA Section 304, including its repeal of Section 1182(c), is to be applied in any removal proceeding commenced after IIRIRA's general effective date of April 1, 1997. App. 33a-39a. He noted that such application raises no constitutional concern, for "Congress may effect such changes to require removal of an alien who would not have been subject to removal before the changes became effec-

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[12] Although the court did not expressly conclude that such application would be unconstitutional, it did invoke a perceived need to avoid placing IIRIRA Section 304 in constitutional doubt. App. 22a n.6. The court acknowledged that the Due Process Clause of the Fifth Amendment places only "a narrow limit on Congress's power" to enact retrospective legislation, but, it stated, application of IIRIRA Section 304 to aliens convicted on the basis of pre-IIRIRA guilty plea would raise a "profound constitutional question." *Ibid.* The court remarked that "the Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual" (presumably referring to aliens). *Ibid.*

tive," and "may alter the requirements for continued residence in this country." App. 33a-34a. He then found it "clear on the face of the statute" that Congress had repealed Section 1182(c) relief for aliens placed in removal proceedings after IIRIRA took effect. App. 34a. Stressing IIRIRA's "comprehensive method of implementation" and Congress's intent that it be "a complete break from the past," he concluded that "Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997." App. 34a-35a. The majority's contrary ruling, Judge Walker submitted, created an "awkward statutory patchwork" (App. 37a) because it gave respondent "access to a waiver of deportation hearing under [Section 1182(c)] that was part and parcel of a statutory scheme that no longer exists" (*ibid.*). He also concluded that applying Section 304 to respondent's case would not conflict with the presumption against retroactivity because Section 304 "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." App. 39a. Judge Walker further stated (*ibid.*) that, even if the temporal scope of Section 304 were ambiguous, he would defer to the BIA's construction of it under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided two issues of broad significance for the administration of the Nation's immigration laws. First, it has concluded that criminal aliens found removable because of an aggravated felony conviction in proceedings commenced under IIRIRA may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of their removal orders on constitutional and statutory grounds. That decision conflicts directly with the decisions of two other courts of

appeals. The decision also cannot be squared with the structure of judicial review of removal orders that Congress has enacted, and could lead to significant delays in the removal of criminal aliens from the United States, despite Congress's particular concern that removal of criminal aliens be expedited. Resolution of the proper forum for challenges to removal orders is profoundly important to the orderly administration of the Nation's immigration laws after IIRIRA.

Second, the court of appeals has concluded that aliens convicted of aggravated felonies before AEDPA and IIRIRA were enacted but placed in removal proceedings after IIRIRA took effect may still obtain relief from removal under old 8 U.S.C. 1182(c) (1994)—even though Section 1182(c) was *repealed* by IIRIRA when IIRIRA took effect. That decision is manifestly wrong. It proceeds from a misunderstanding of IIRIRA Section 304, which comprehensively replaced the old system of deportation, including proceedings for discretionary relief, with a wholly new system of removal, with its own, different eligibility criteria for discretionary cancellation of removal. It also relies on a misapprehension of the presumption against retroactive application of federal statutes, which has no operation in this removal context. And the decision cannot be squared with other appellate decisions recognizing that former Section 1182(c) no longer applies in removal proceedings under IIRIRA. The court of appeals' reading of IIRIRA Section 304, if not reversed, could affect the removal proceedings of many criminal aliens who were convicted of criminal offenses before AEDPA and IIRIRA were enacted but who have not yet been charged with removal because they have not completed their prison terms.

1. a. The court of appeals' central jurisdictional ruling in this case and in *Calcano*[13] is that a criminal alien who is precluded from obtaining judicial review of his removal order in the court of appeals because of 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) may nontheless obtain judicial review by filing a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. App. 6a. That holding conflicts directly with the decisions of two other courts of appeals, as the court below acknowledged in *Calcano* (see App. 57a-59a).[14] In *Max-George* v. *Reno*, 205 F.3d 194 (2000), petition for cert. pending, No. 00-6280, the Fifth Circuit, upholding the dismissal of an alien's habeas corpus petition filed in district court, held that "IIRIRA eliminates § 2241 jurisdiction" for aggravated felons seeking to challenge their removal orders, and that "[t]he clear language of IIRIRA's permanent rules force[s] an alien to raise all potential issues regarding his deportation at one place and time: a petition for review filed in the court of appeals." 205 F.3d at 198; see *id.* at 199 ("IIRIRA's permanent provisions eliminate § 2241

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[13] Because the court of appeals dismissed the aliens' petitions for review in *Calcano* and the government was therefore nominally the prevailing party in that case, we have not sought review of that decision in this Court. The court's reasoning in *Calcano*, however, was the basis for a decision adverse to the government in this case.

[14] The Second Circuit's decision is consistent, however, with decisions of the First, Third, and Ninth Circuits. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over similar "retroactivity" challenge); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (holding that, because of Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar "retroactivity" claim, but that district court had jurisdiction to entertain the claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.2d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, because of Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

habeas corpus jurisdiction for those cases that fall within § 1252(a)(2)(C).").[15] Similarly, in *Richardson* v. *Reno*, 180 F.3d 1311 (1999), cert. denied, 120 S. Ct. 1529 (2000), the Eleventh Circuit held (*id.* at 1315) that "IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings," and that IIRIRA "constitute[s] a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders, removal proceedings, and detention pending removal."[16] Certiorari is warranted to resolve this important jurisdictional issue, which potentially affects thousands of criminal aliens who may seek to file petitions for review or for habeas corpus to challenge their removal orders. Those aliens, the government, and the courts should know definitively whether aliens may challenge their removal orders in district court under Section 2241, or whether they must present any challenges only in the court of appeals.

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[15] The Fifth Circuit has relied on its decision in *Max-George* in subsequent cases to order the dismissal of habeas corpus petitions brought by aliens in district court. See *Perez* v. *Reno*, 227 F.3d 294 (2000); *Garnica-Vasquez* v. *Reno*, 210 F.3d 558 (2000); *Finlay* v. *INS*, 210 F.3d 556 (2000).

[16] As we pointed out in our brief in opposition (at 21-23) in *Richardson*, that case did not actually involve an alien's challenge to a final removal order, but rather involved an alien's challenge to his detention pending the BIA's final decision in his removal proceeding. The *Richardson* court's conclusion that IIRIRA had precluded habeas corpus jurisdiction over challenges to final removal orders was, however, a necessary predicate for its conclusion that it also lacked jurisdiction over challenges to detention pending the final removal decision. See 180 F.3d at 1314-1317. In addition, the Eleventh Circuit has since relied on its decision in *Richardson* to conclude that a district court lacked habeas corpus jurisdiction over an aggravated felon's challenge to his final removal order. See *Russell* v. *Reno*, No. 99-10084 (11th Cir. May 9, 2000), slip op. 2 (per curiam), petition for cert. pending, No. 00-5970; see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307 (11th Cir. 2000) (stating that, "under the permanent provisions of IIRIRA, § 2241 habeas jurisdiction over removal cases no longer exists") (footnote omitted).

b. The court of appeals' jurisdictional ruling is fundamentally at odds with the basic framework of Congress's legislation for judicial review of removal orders. Since 1961, Congress has consistently provided that such review should proceed only in the courts of appeals, in order to prevent delays in deportations.[17] Although Congress had also expressly provided, in old Section 1105a(a)(10), that aliens actually held in custody could obtain limited judicial review by habeas corpus, Congress repealed even that provision in Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." 110 Stat. 1268. That repeal divested the district courts of authority to review the merits of final deportation orders on habeas corpus, and made the courts of appeals the exclusive forum for all challenges to deportation orders.

In IIRIRA, Congress confirmed that all judicial review of removal orders must be had in the courts of appeals. In Section 1252(a)(1), Congress provided that "[j]udicial review of a final order of removal * * * is governed only by" the Hobbs Act, 28 U.S.C. 2341-2351, which channels review of agency orders into the courts of appeals. Congress did not

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[17] In 1961, Congress enacted 8 U.S.C. 1105a(a), which provided that the court of appeals review procedures of the Hobbs Act "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." Congress enacted Section 1105a(a) because it was dissatisfied with the bifurcated system of review that resulted from this Court's decisions in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), permitting aliens to proceed in district court. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22, 27-28 (1961). As this Court observed in *Foti* v. *INS*, 375 U.S. 217, 224 (1963), "[t]he fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts". See also *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

provide any general exception for habeas corpus review at the behest of aliens held in custody, as it had provided before AEDPA in former 8 U.S.C. 1105a(a)(10) (1994). Significantly, moreover, Section 1252(a)(1) contains an express exception from its general provision for exclusive review in the courts of appeals only for "an order of removal without a hearing pursuant to" 8 U.S.C. 1225(b)(1) (Supp. IV 1998). For cases covered by that exception, Section 1252(e)(2) provides that "[j]udicial review of any determination made under [Section 1225(b)(1)] is available in habeas corpus proceedings." Thus, when Congress intended in IIRIRA to provide for judicial review of final removal orders in habeas corpus proceedings in district court, it expressly so provided in Section 1252 itself. Congress's omission of any provision for habeas corpus review of any other kind of removal order necessarily means that such review is barred. See *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1987); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Furthermore, to ensure that the specified procedures for judicial review in Section 1252 would not be circumvented, Congress enacted Section 1252(b)(9), which provides sweepingly: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252 itself]." Section 1252(b)(9) confirms that, except for the narrow circumstance, expressly mentioned in Section 1252(a)(1) itself, where Congress permitted habeas corpus review, the court of appeals review procedures of Section 1252 are the exclusive ones available to aliens seeking to challenge their removal orders. Indeed, this Court described Section 1252(b)(9) in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 483 (1999), as an "unmis-

takable 'zipper' clause" that channels judicial review to the courts of appeals.

Finally, Congress also restricted, to a considerable degree, judicial review of criminal aliens' removal orders. Section 1252(a)(2)(C) provides that, "[n]otwithstanding any other provision of law"—broad language not limited to Section 1252 or even the INA—"no court shall have jurisdiction to review any final order of removal against" an aggravated felon. The court of appeals' ruling that respondent could obtain review in the district court of the final order of removal against him is flatly inconsistent with that ban.

These consistent and successive enactments show that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals. The court of appeals in this case, however, concluded that Congress has not acted with sufficient clarity to prevent aliens from challenging their removal orders in the district courts under Section 2241. The result of the court of appeals' decision is that *criminal* aliens may proceed in district court under Section 2241 to test the validity of their removal orders, whereas all other aliens must file petitions for review in the court of appeals, pursuant to the traditional exclusive-review procedures. That result not only frustrates Congress's intent that review of criminal aliens' deportation proceedings be streamlined and limited; it turns Congress's scheme on its head—as the court of appeals acknowledged in *Calcano*. See App. 72a (agreeing that government's reading "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review"). It is scarcely conceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and delay) of their removal orders than all other aliens. Cf. *Foti* v. *INS*, 375 U.S. 217, 224 (1963) (noting

Congress's concern with delays in judicial review of removal orders); *Stone* v. *INS*, 514 U.S. 386, 399 (1995) (similar).[18]

c. The court of appeals' jurisdictional decision also proceeds from a misplaced reliance on two canons of statutory interpretation. First, invoking this Court's decisions in *Felker* and *Yerger*, holding that implied repeals of habeas corpus jurisdiction are not favored, the court stated in *Calcano* that it could not "presume" that Congress had divested district courts of their authority to review removal orders given that Congress had not "explicitly mention[ed] the jurisdictional statute [28 U.S.C. 2241] or the general type of jurisdiction by name." App. 61a; see App. 62a-63a (stressing that IIRIRA "do[es] not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241").

This case, however, does not involve an assertion of "implied" repeal of habeas corpus jurisdiction. In AEDPA Section 401(e), Congress *expressly* repealed the INA's prior provision for habeas corpus review in 8 U.S.C. 1105a(a)(10) (1994). See p. 4, *supra*. In IIRIRA, Congress also *expressly* provided that judicial review of a final removal order may be had "only" in the court of appeals, subject only to a narrow exception allowing judicial review in habeas corpus proceedings for a confined set of cases that does not encompass this case. See pp. 21-22, *supra*. Neither *Felker* nor *Yerger* intimates, much less holds, that such statutory provisions are

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[18] Aliens proceeding in district court pursuant to Section 2241 have markedly greater opportunities for delay than those proceeding directly in the courts of appeals. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. IV 1998). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. IV 1998). And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

ineffective to bar review on habeas corpus, and that the only way in which Congress can divest the district courts of authority under Section 2241 is by referring to that specific statute or using the words "habeas corpus" in an enactment. Rather, if Congress's intent is clear that another statutory scheme provides the exclusive means by which an alien's removal order may be tested, the courts must give effect to that determination. Here, the entire, self-contained structure of judicial review that Congress has erected in Section 1252—requiring that judicial review of removal orders be governed "only" by the court of appeals review procedures (Section 1252(a)(1)); precluding judicial review of aggravated felons' removal orders "[n]otwithstanding any other provision of law" (Section 1252(a)(2)(C)); dictating that judicial review of all legal and factual issues arising in removal proceedings be had "only" under Section 1252 itself (Section 1252(b)(9)); and creating an express but very narrow provision for certain habeas corpus proceedings (pp. 21-22, *supra*)—demonstrates that a removal order may be challenged only in the courts of appeals under Section 1252, and not also in the district courts under Section 2241.

The court of appeals also perceived a need to avoid a serious constitutional question that would supposedly arise under the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, if no federal court had authority to consider respondent's particular challenge to his removal order. See App. 68a. We agree with the court of appeals that Section 1252(a)(2)(C) bars it from entertaining the claim advanced by respondent in this case, namely, that the repeal of old Section 1182(c) does not apply to his case. Nor, as we have explained, could that claim be presented to the district court. The withdrawal of the courts' authority to hear that particular claim, however, raises no constitutional concerns, for that claim does not fall within the scope of the habeas corpus remedy preserved by the Suspension Clause. Respondent has not

contended that the Attorney General lacks authority to remove him, nor has he contested that he was properly found removable based on his aggravated felony conviction. Rather, he argues that the BIA erred in concluding that it could not grant him discretionary relief from a concededly proper removal.

This Court has never held that such a claim of error is within the constitutional core of the Great Writ that must be preserved under the Suspension Clause. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as an "act of grace," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). The court of appeals therefore erred in suggesting that the Suspension Clause would be violated if respondent is not afforded a judicial forum for review of his claim, and its misplaced concern should not have led it to conclude that Section 2241 remains available as a vehicle for presentation of that claim.

2. a. Certiorari is also warranted to review the court of appeals' decision on the merits that aliens who pleaded guilty to aggravated felonies before AEDPA's enactment, but were placed in removal proceedings under IIRIRA, remain eligible for discretionary relief from deportation under the repealed Section 1182(c). That ruling represents a manifestly erroneous application of both steps of the *Landgraf* test for determining the temporal reach of a federal statute. It also conflicts with this Court's settled jurisprudence that Congress may alter the bases on which aliens are to be removed without implicating constitutional retroactivity concerns.

First, under the first *Landgraf* step, Congress has clearly prescribed that old Section 1182(c) has no application in any removal proceeding commenced on or after April 1, 1997. In

Section 304 of IIRIRA, Congress comprehensively revised the INA: it eliminated the INA's old "deportation" and "exclusion" proceedings; it repealed Section 1182(c), which was applicable in such proceedings; it created a new "removal" proceeding; and it created a new form of discretionary relief (cancellation of removal). IIRIRA also established the same effective date for *all* of those changes made by Section 304, which are plainly to be taken as a whole. See IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA's effective date thus marks a caesura, after which a new statutory framework is to be applied. The court of appeals' decision, however, creates a hybrid form of proceeding, in which aliens who concededly are properly placed in *removal* proceedings under the new statutory provisions enacted by IIRIRA Section 304 may nonetheless apply for relief from *deportation*, despite IIRIRA Section 304's repeal of that form of relief. Congress simply did not fashion any such interweaving of old and new parts of the INA.

The court of appeals also erred in concluding, under the second *Landgraf* step, that application of IIRIRA's repeal of Section 1182(c) to aliens who pleaded guilty before that repeal would contravene the presumption against retroactivity. That conclusion is contrary to this Court's longstanding understanding of deportation proceedings as inherently prospective, in that they concern the alien's ongoing right to remain here. As the Court explained in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), "[t]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." Similarly, in *AADC*, *supra*, the Court emphasized that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law." 525 U.S. at 491. Thus, as Judge Walker observed in dissent below (App. 33a-34a), Congress has frequently altered the

categories of aliens who may continue to reside in the United States, and this Court has consistently upheld Congress's power to do so against constitutional objection.[19] And as Judge Walker also noted (App. 39a), even if it were not sufficiently clear under the first step of the *Landgraf* analysis that Congress had intended IIRIRA Section 304's repeal of former Section 1182(c) to apply to all new removal proceedings commenced under IIRIRA, the courts should defer to the Attorney General's definitive construction of the temporal scope of that repeal under standard principles of administrative law, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), and the Attorney General's particular statutory charge to issue controlling constructions of the INA, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); 8 U.S.C. 1103(a)(1) (Supp. IV 1998).

b. The court of appeals' decision on the merits cannot be squared with decisions of other courts of appeals recognizing that all of IIRIRA Section 304, including its repeal of Section 1182(c), applies in all removal proceedings commenced after IIRIRA became effective. In *Morales-Ramirez* v. *Reno*, 209 F.3d 977 (7th Cir. 2000), an alien was served with a notice of exclusion proceedings before AEDPA's enactment but was not actually placed in removal proceedings until after IIRIRA's effective date; he contended that the INS violated his due process rights by proceeding against him in removal proceedings, in which he was ineligible for cancellation of removal because of his aggravated felony conviction, rather than in old exclusion proceedings, in which he could have applied for relief under old Section 1182(c). The Seventh Circuit rejected that contention, concluding that, because the

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[19] See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).

INS did not file the charging document with the immigration court until after IIRIRA became effective, the alien was never placed in pre-IIRIRA exclusion proceedings (see p. 9 n.8, *supra*), and so he had "no protected interest in retaining the ability guaranteed by [Section 1182(c)] to apply for discretionary waiver of exclusion." *Id.* at 983.

Similarly, in *Galindo-Del Valle* v. *Attorney General*, 213 F.3d 594 (11th Cir. 2000), petition for cert. pending, No. 00-362, an alien convicted of an aggravated felony before AEDPA was enacted, but placed in removal proceedings after IIRIRA became effective, challenged as unconstitutional the BIA's alleged application of AEDPA Section 440(d) in his case to bar him from relief under old Section 1182(c). The court of appeals held that Galindo-Del Valle lacked standing to make that contention because "the INS did not commence proceedings against Galindo-Del Valle until after IIRIRA's permanent rules had repealed former [Section 1182(c)] in its entirety," and "AEDPA § 440(d) was not applied to Galindo-Del Valle to bar [Section 1182(c)] relief because [Section 1182(c)] had been repealed." 213 F.3d at 598. Both the Seventh and Eleventh Circuits have therefore relied on their (correct) understanding of the temporal scope of IIRIRA Section 304 to reject constitutional claims by aliens placed in post-IIRIRA removal proceedings that they should have been allowed to apply for relief under former Section 1182(c).

c. The issue of the temporal scope of IIRIRA's repeal of former Section 1182(c) is of considerable importance in the Attorney General's administration of the INA. More than 50 other aliens have already challenged their removal orders in the lower courts on grounds similar to those raised by respondent. Moreover, the impact of the court of appeals' decision is potentially enormous. We have been informed by the Executive Office for Immigration Review (EOIR), the separate entity within the Justice Department that adjudi-

cates immigration cases, that in just the first year after IIRIRA became effective, EOIR decided about 13,000 removal cases involving aliens convicted of aggravated felonies. Many of those aliens were likely convicted before AEDPA was enacted. Now they—along with thousands of other criminal aliens who have been or in the future will be placed in removal proceedings—may seek to challenge their removal orders on the ground that they should have been allowed to apply for relief under former Section 1182(c). Accordingly, if the Court concludes that the district court properly exercised habeas corpus jurisdiction over respondent's challenge to his removal order, the Court should definitively resolve whether relief remains available under former Section 1182(c) to aliens such as respondent who were placed in removal proceedings after IIRIRA Section 304 became effective, notwithstanding Congress's express repeal of Section 1182(c) upon the effective date of IIRIRA's new removal procedures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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116pp

TABLE OF CONTENTS

	Page
Appendix A (court of appeals opinion, Sept. 1, 2000) ...	1a
Appendix B (court of appeals opinion in *Calcano-Martinez* v. *INS*, *Madrid* v. *INS*, and *Khan* v. *INS*. Sept. 1, 2000)	40a
Appendix C (district court decision, Aug. 30, 1999)	75a
Appendix D (district court judgment, Aug. 30, 1999) ...	92a
Appendix E (decision of Board of Immigration Appeals, Nov. 10, 1998)	94a
Appendix F (decision of immigration judge, Jan. 12 1998)	96a
Appendix G (constitutional and statutory provisions involved)	98a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-2614

ENRICO ST. CYR, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Argued: Mar. 30, 2000]
[Decided: Sept. 01, 2000]

Before: OAKES, WALKER and KEITH,*
Circuit Judges.

OAKES, *Senior Circuit Judge*:

The case before us presents legal questions of reviewability and retroactivity under the 1996 amendments to the Immigration and Nationality Act ("INA"). Congress amended the INA through the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 *et seq.* (1996) and the Illegal Immigration Reform and Immi-

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

grant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.* (1996). These laws severely narrowed the rights of certain classes of aliens, including those like St. Cyr who were ordered deported because of a prior drug conviction, and have spawned a multitude of judicial decisions.

AEDPA § 440(d) and IIRIRA § 304 significantly limit the cases where discretionary relief from removal can be sought. They effectively preclude an alien, who is removable from the United States because of a conviction of a crime that qualifies as an "aggravated felony" under the law, from applying for discretionary relief from removal. St. Cyr's removal proceedings were commenced after the enactment of the AEDPA and IIRIRA. However, St. Cyr pled guilty to the drug-related offense that rendered him deportable and ineligible under the AEDPA and IIRIRA to apply for discretionary relief a year before the statutes were enacted. He argues that applying the AEDPA § 440(d) and IIRIRA § 304 bar to his removal proceedings would have an impermissible retroactive effect. Thus, in this case, we must determine whether the bar to discretionary relief from removal is properly applied retroactively to pre-enactment guilty pleas.

BACKGROUND

Enrico St. Cyr, a native of Haiti, was admitted to the United States as a lawful permanent resident on June 17, 1986. St. Cyr's family lives in the United States. His parents and sister are citizens of this country and his brother is a lawful permanent resident.

On March 8, 1996, prior to the enactment date of the AEDPA and IIRIRA, St. Cyr pled guilty to the sale of a controlled hallucinogenic narcotic in violation of Connecticut General Statutes § 21a-277(a). At the time that St. Cyr pled guilty to the charge, the drug conviction rendered him deportable under the immigration laws. *See* INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251(a)(2)(B)(i) (1994), now renumbered as INA § 237(a)(2)(B)(i), codified at 8 U.S.C. § 1227(a)(2)(B)(i) (1999); *see also* INA § 241(a)(2)(A)(iii), codified at 8 U.S.C. § 1251(a)(2)(A)(iii) (1994), now renumbered as INA § 237(a)(2)(iii), codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (1999); INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43) (1999).[1]

On April 10, 1997, the Immigration and Naturalization Service ("INS") issued St. Cyr a Notice to Appear, charging him as removable under INA § 237(a)(2)(A)(iii) because he had been convicted of an aggravated felony. On January 12, 1998, an immigration judge ("IJ") found that St. Cyr was removable under INA § 237(a)(2)(A)(iii). In the time between St. Cyr's conviction and his receipt of a Notice to Appear, Congress enacted the AEDPA and IIRIRA. These laws significantly limited the cases where discretionary

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[1] INA § 237(a)(2)(B)(i) provides that "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving [a small amount of marijuana for one's own use] is deportable."; INA § 237(a)(2)(A)(iii) provides that "Any alien who is convicted of an aggravated felony at any time after admission is deportable."; INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43) defines "aggravated felony" to include illicit trafficking in a controlled substance.

relief from deportation could be sought and rendered an alien who was removable because of an aggravated felony conviction statutorily ineligible to apply for relief from deportation.

At his hearing, St. Cyr sought to prevent his removal by applying for a discretionary waiver of deportation under former INA § 212(c). *See* 8 U.S.C. § 1182(c) (1996) (repealed by IIRIRA, § 304(b), 110 Stat. at 3009-597, September 30, 1996). The IJ denied St. Cyr's § 212(c) application. St. Cyr appealed his removal order to the Board of Immigration Appeals ("BIA"). Because of the changes made by Congress to the immigration laws, specifically IIRIRA § 304(b)'s repeal of the availability of § 212(c) relief to aliens such as St. Cyr, the BIA dismissed his appeal on November 10, 1998.

On April 27, 1999, St. Cyr filed a habeas corpus petition in the United States District Court for the District of Connecticut. In his petition, he argued that § 440(d) of the AEDPA and IIRIRA § 304 should not be applied retrospectively to bar his eligibility for § 212(c) relief because both his criminal conduct and his conviction occurred prior to the statutes' enactment. The INS argued that the 1996 amendments to the INA divested the district court of jurisdiction to hear St. Cyr's habeas petition. On the merits, the INS argued that § 440(d) of the AEDPA was applicable to St. Cyr's case because removal proceedings had been commenced against him after the effective date of the AEDPA. Specifically, the INS argued that applying § 440(d) to aliens ordered deportable because of a criminal conviction that was entered prior to the AEDPA's effective date was not an unjustified retrospective application of § 440(d).

On August 23, 1999, the district court rejected the INS's arguments and held that it had jurisdiction to hear the habeas petition because the 1996 amendments to the INA did not explicitly divest a district court of its habeas jurisdiction over final removal orders under 28 U.S.C. § 2241. It concluded that the scope of its review pursuant to 28 U.S.C. § 2241 included St. Cyr's statutory claim that the BIA had misapplied the immigration laws.

In addressing the merits of St. Cyr's habeas petition, the district court held that AEDPA § 440(d) is inapplicable to an alien placed in removal proceedings after the AEDPA's enactment if the relevant convictions, criminal proceedings, or underlying criminal conduct occurred prior to enactment. The court reasoned that Congress did not intend AEDPA § 440(d) to be applied retroactively to such pre-enactment events because it would unfairly attach new legal consequences to pre-AEDPA criminal conduct. Thus, the district court concluded that St. Cyr's removal proceedings should be governed by the laws that were in effect at the time he committed the crime. The INS timely appealed.

DISCUSSION

I. Jurisdiction.

Because the question whether the district court had subject matter jurisdiction in this case is a question of law, we review it *de novo*. *See Conntech Dev. Co. v. University of Connecticut Educ. Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996).

The INS's arguments that the district court lacked jurisdiction under 28 U.S.C. § 2241 to decide St. Cyr's

claim are foreclosed by our decision in *Calcano-Martinez v. Reno*, Civ. Nos. 98-4033, 98-4214, 98-4246 (2d Cir. 2000), a case argued on the same day as this one. In that case, we held that the permanent rules of IIRIRA do not divest Article III courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available. Here, no such avenue existed because St. Cyr, convicted of a crime involving a controlled substance, is an alien deportable under INA § 237(a)(2)(A)(iii). A petition in the court of appeals pursuant to INA § 242(a)(1) is, therefore, unavailable to him. *See* 8 U.S.C. § 1252(a) (2)(C) (1999).

Although a federal court's habeas jurisdiction does not include all challenges that an alien may launch against his or her removal order, St. Cyr's habeas petition raises pure questions of law. He is not challenging the BIA's refusal to exercise its discretion in his favor. Rather, he is challenging the BIA's determination that it cannot legally consider St. Cyr's request to exercise its discretion. Therefore, his habeas challenge to his final order of removal is the type of claim that is cognizable in the district court under 28 U.S.C. § 2241.

Because there is no other avenue for judicial review available and St. Cyr's petition raises a purely legal challenge to his final order of removal, the district court had subject matter jurisdiction to review his habeas petition.

II. Availability of § 212(c) relief.

Having determined that the district court had jurisdiction to decide St. Cyr's claim, we turn to the issue

raised by St. Cyr in his habeas petition: whether AEDPA § 440(d) and IIRIRA § 304, which essentially make discretionary relief unavailable to an alien like St. Cyr, apply to his removal proceeding.

A. History of Discretionary Relief.

Under the law in effect prior to the enactment of the AEDPA, certain aliens otherwise determined to be deportable were entitled to apply to the Attorney General or her delegates[2] for a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c) (1994). Former § 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [provisions setting forth various grounds for exclusion]. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years.

8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA § 304(b), 110 Stat. at 3009-597, Sept. 30, 1996).

Although the literal terms of § 212(c) appeared to apply only to resident aliens who had temporarily proceeded abroad and were returning to the United States, since 1976 the section has been interpreted by this Court to permit the Attorney General to waive the

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[2] The Attorney General's delegates include IJs and the BIA.

grounds for deportation under certain conditions in the case of a lawfully admitted permanent resident in deportation proceedings. *See Buitrago-Cuesta v. INS*, 7 F.3d 291, 292 (2d Cir. 1993); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976).

Discretionary relief from deportation, which has been available in our system in some form since at least 1917, *see Francis*, 532 F.2d at 270, provides the Attorney General with a mechanism to consider the impact of immigration on an alien's family. Prior to 1996, INA § 212(c) gave power to the Attorney General to permit a worthy alien to stay in this country in order to avoid extraordinary hardship to the alien's family in the United States. *See id.* at 272. In a case where a convicted alien demonstrated that he or she had a lawful unrelinquished domicile in the United States for at least seven years and that his or her conviction was not for an "aggravated felony," for which he or she had served a term of imprisonment of five years or longer, the Attorney General could, in her discretion, waive deportation. *See* 8 U.S.C. § 1182(c) (1994). Under the law in effect before 1996, if the Attorney General denied relief, the alien could challenge that denial by filing a petition for review in the court of appeals. *See* 8 U.S.C. § 1105a(a) (1994) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, Sept. 30, 1996).

On April 24, 1996, Congress enacted the AEDPA, of which § 440(d) expanded the category of criminal convictions that would render an alien ineligible to apply for § 212(c) relief. The explicit goal of the AEDPA was to enhance "the ability of the United States to deport criminal aliens." H.R. Conf. Rep. No. 104-518, at 119

(1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 952.[3] Section 440(d) struck the language "has been convicted of one or more aggravated felonies" and that which followed in § 212(c) and inserted the following bar:

> This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

AEDPA § 440(d), 110 Stat. at 1277.[4] Under the amended version, a waiver could not be granted to an alien convicted of certain enumerated offenses including a drug-related crime, two or more offenses involving

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[3] This was by no means Congress's first attempt to narrow a criminal alien's eligibility for a waiver from deportation. Congress passed the Anti-Drug Abuse Act of 1988 and made conviction of an aggravated felony an additional ground for deportation. *See* Anti-Drug Abuse Act of 1988 § 7344, 102 Stat. at 4470-71 (codified at 8 U.S.C. § 1251(a)(2)(A)(iii) (1996)). In 1990, Congress amended § 212(c) and precluded waiver for aliens convicted of aggravated felonies who had served at least five years in prison for the conviction. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990), codified at 8 U.S.C. § 1182(c). Also in 1990, Congress expanded the definition of aggravated felony to include more offenses and render a greater number of criminal aliens ineligible for discretionary relief. *See id.* § 501, 104 Stat. at 5048. Again, in 1994, Congress expanded the definition of aggravated felony to include more classes of crimes. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222(a), 108 Stat. 4305, 4322 (1994), codified at 8 U.S.C. § 1101(a)(43).

[4] INA § 241, codified at 8 U.S.C. § 1251 (1994) was renumbered by IIRIRA as INA § 237, codified at 8 U.S.C. § 1227. *See* IIRIRA § 305(a)(92), 110 Stat. at 3009-598.

moral turpitude, and an aggravated felony, regardless of time served in prison.

Just a few months later, on September 30, 1996, Congress enacted IIRIRA, which wrought further changes to the availability of deportation waivers. IIRIRA included temporary transitional rules and permanent rules. Under the statutory interplay of IIRIRA's transitional rules and the AEDPA, the Attorney General was able, in her discretion, to grant relief from deportation under INA § 212(c) as amended by § 440(d). *See* IIRIRA § 309(c)(1), 110 Stat. at 3009-625 (most of IIRIRA amendments to the INA do not apply to aliens placed in deportation proceedings prior to April 1, 1997); *see also Tasios v. Reno*, 204 F.3d 544, 547 n.1 (4th Cir. 2000).

The permanent provisions of IIRIRA, however, repeal INA § 212(c) altogether and consolidate prior "suspension of deportation" relief and aspects of former § 212(c) relief into an entirely new form of relief. *See* 8 U.S.C. § 1229b(a)(3) (1999). Section 304(a) of IIRIRA, entitled "Cancellation of removal for certain permanent residents," found at INA § 240A, provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a) (1999). Cancellation of removal is thus limited to a smaller category of aliens than had historically been eligible for pre-AEDPA § 212(c) relief because it is unavailable to all aliens convicted of aggravated felonies and not just to those imprisoned for more than five years. *Compare* 8 U.S.C. § 1182(c) (1994) *with* 8 U.S.C. § 1129b (1999). Cancellation of removal, however, is categorically available to a larger number of aliens than those eligible under AEDPA § 440(d) because it restores the availability of discretionary relief for aliens deportable because they committed two or more crimes of moral turpitude under INA § 237(a)(2)(A)(ii). *Compare* 8 U.S.C. § 1182(c) as amended by AEDPA § 440(d) *with* 8 U.S.C. § 1229b (1999).

This complex statutory history applies to St. Cyr as follows: when St. Cyr pled guilty to drug trafficking in March of 1996, he was deportable under the immigration laws as an alien convicted of a drug-related offense which constituted an aggravated felony as defined under the INA. *See* 8 U.S.C. § 1251(a)(2)(B)(i) (1994); 8 U.S.C. § 1251(a)(2)(A)(iii) (1994); 8 U.S.C. § 1101(a)(43). At the time he pled guilty to the deportable offense, he was eligible to apply for a waiver of deportation under § 212(c) of the INA. On April 24, 1996, before removal proceedings were commenced against St. Cyr, AEDPA § 440(d) was enacted, making aliens such as he ineligible to apply for a § 212(c) waiver. By April 10, 1997, the date that removal proceedings against St. Cyr were commenced, INA § 212(c) relief had been repealed by IIRIRA § 304(b) and replaced by "cancellation of re-

moval" in § 304(a). St. Cyr was ineligible to apply for "cancellation from removal" by its terms because he was convicted of an aggravated felony. *See* 8 U.S.C. § 1101(a)(43). Thus, if either AEDPA § 440(d) or IIRIRA § 304 apply to this case, as the INS argues, St. Cyr is removable because he pled guilty to a deportable offense and is statutorily ineligible to apply to the BIA for discretionary relief from deportation.

B. Retroactivity.

Our analysis of whether AEDPA § 440(d) and IIRIRA § 304 (referred to collectively as "the bar to relief") apply to removal proceedings against an alien who pled guilty to a deportable crime before the date of IIRIRA's enactment is governed by the legal principles announced by the Supreme Court in its landmark decisions, *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997). The Supreme Court directs that we begin with the "presumption . . . deeply rooted in our jurisprudence," against the retroactive application of legislation. *Landgraf*, 511 U.S. at 265; *Hughes Aircraft*, 520 U.S. at 946 (quoting *Landgraf*). This "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, *J.*, concurring)). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Application of this presumption requires that statutes are not

afforded retrospective effect unless "Congress has clearly manifested its intent to the contrary." *Hughes Aircraft*, 520 U.S. at 946.

The Supreme Court in *Landgraf* provided the following framework for determining whether a law should apply to cases where the underlying conduct occurred prior to enactment:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. 511 U.S. at 280. *Landgraf* therefore contemplates a two-step inquiry: (1) whether Congress prescribed the statute's temporal reach and, if not, (2) a determination whether retrospective application would have a "retroactive effect." If application of the statute to the conduct at issue would have a retroactive effect, "then, in keeping with our 'traditional presumption' against retroactivity, we presume that the statute does not apply to that conduct." *Martin v. Hadix*, 527 U.S. 343, 352,

119 S. Ct. 1998, 144 L.Ed.2d 347 (1999) (quoting *Landgraf*, 511 U.S. at 280).

1. Congressional Intent.

Our first step under *Landgraf* is to determine, using ordinary tools for statutory interpretation, whether Congress expressly prescribed that AEDPA § 440(d) and IIRIRA § 304 should be applied to removal proceedings involving convictions entered prior to its enactment. *See* 511 U.S. at 280. In *Henderson v. INS*, 157 F.3d 106, 129-30 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999), we analyzed whether AEDPA § 440(d) applied to deportation proceedings pending on the date of enactment. Our analysis ended after the first *Landgraf* step because there existed "abundant direct evidence that the section was *not* intended to apply retroactively" to deportation proceedings pending on the date of enactment. *See id.* at 129. Our decision that Congress clearly intended that AEDPA § 440(d) not apply to aliens for whom deportation proceedings had, on the date of AEDPA's enactment, already commenced, was in accord with the majority of U.S. Courts of Appeals to consider the same question. *See Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 675-76 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1303-04 (11th Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 133 (1st Cir. 1989), *cert. denied*, *Reno v. Goncalves*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999); *Sandoval v. Reno*, 166 F.3d 225, 241-42 (3d Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035, 1040-41 (7th Cir. 1998), *cert. denied*, *Reno v. LaGuerre*, —— U.S. ——, 120 S. Ct. 1157, 145 L.Ed.2d 1069 (2000).

The specific issue raised in this case, however, is not whether the bar to relief applies to pending removal proceedings but whether it bars an alien who pled guilty to the deportable crime before the AEDPA or IIRIRA's effective date from applying for a waiver. The question whether Congress intended AEDPA § 440(d) to apply to removal proceedings against an alien ordered removed because of a pre-enactment conviction or criminal conduct has been much discussed in numerous published opinions of district courts and courts of appeals. When the past conduct under the *Landgraf* analysis changes from the commencement of removal proceedings to the conviction or criminal conduct, the majority of courts of appeals that have considered AEDPA § 440(d) conclude that Congress's intent whether to apply the law retrospectively is ambiguous. *See Mattis v. Reno*, 212 F.3d 31, 36 (1st Cir. 2000); *Tasios v. Reno*, 204 F.3d 544, 550 (4th Cir. 2000); *Magana-Pizano*, 200 F.3d at 612; *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 307-8 (5th Cir. 1999); *DeSousa v. Reno*, 190 F.3d 175, 186-87 (3d Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999), *cert. denied Palaganas-Suarez v. Greene*, ___, U.S. ___, ___ U.S. ___, 120 S. Ct. 1539, 146 L.Ed.2d 352 (2000); *Turkhan v. Perryman*, 188 F.3d 814, 826 (7th Cir. 1999). We agree with the majority of courts that have held that Congress's intent whether to apply AEDPA § 440(d) to pre-enactment convictions is ambiguous and because the question has been thoroughly analyzed in the foregoing opinions, we do not set forth our own detailed analysis of AEDPA § 440(d).

We turn now to IIRIRA § 304(b). The INS argues that, unlike AEDPA § 440(d), Congress provided

specific "statutory guidance" in IIRIRA § 309(a) as to whether IIRIRA § 304 reaches back to bar an alien who pled guilty to a deportable crime before the effective date of IIRIRA. IIRIRA § 309(a) provides that the new rules added by IIRIRA §§ 301-308, including IIRIRA's repeal of § 212(c) relief and substitution of cancellation of removal relief contained in IIRIRA § 304(a), apply to an alien covered by the rules unless that alien is currently in removal proceedings. *See* IIRIRA § 309(a), 110 Stat. at 3009-625 (new rules apply except to "an alien who is in exclusion or deportation proceedings as of [April 1, 1997]"). Thus, according to the INS, Congress indicated that IIRIRA's permanent rules, including § 304, apply in cases such as St. Cyr's that are commenced after April 1, 1997.

We disagree that IIRIRA's general effective date provision set forth in IIRIRA § 309(a) demonstrates that Congress carefully considered whether the repeal of the only opportunity for relief from removal should bar that relief for an alien who pled guilty prior to IIRIRA's enactment to the crime rendering him or her removable. In *Landgraf*, the Supreme Court noted that a provision stating that "[a] statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." 511 U.S. at 257. Although the language in IIRIRA § 309(a) is arguably more direct than a typical effective date provision, it is not precise enough to mandate retroactive application of IIRIRA § 304 under the first step of the *Landgraf* inquiry. "[T]he only presumption mentioned in [*Landgraf*] is a general presumption *against* retroactivity," *Hughes Aircraft*, 520 U.S. at 950. Accordingly, in its post-*Landgraf* decisions, the Supreme Court has indicated

that a "heightened level of clarity" is required to justify the retroactive application of a law that implicates past conduct. *See Salahuddin v. Mead*, 174 F.3d 271, 275 (2d Cir. 1999) (citing *Lindh v. Murphy*, 521 U.S. 320, 328 n.4, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997); *Hughes Aircraft*, 520 U.S. at 946 (1997)). Therefore, Congress must have used statutory language that can "sustain only one interpretation" in order to make IIRIRA § 304 retroactive to pre-enactment guilty pleas. *See Lindh*, 521 U.S. at 328 n.4. We shall not infer from the general language contained in IIRIRA § 309(a), making § 304 effective in pending proceedings, that Congress also intended the bar to discretionary relief to apply to pre-enactment guilty pleas, an application that we hold today has an impermissible retroactive effect. *See infra* at Section IIB(2).

An examination of other IIRIRA provisions demonstrates that despite the general effective date provision, Congress made sure to use specific language, capable of only one interpretation, when it clearly intended a provision to apply to past conduct relevant to the particular provision. *See, e.g.*, IIRIRA § 321(c), 110 Stat. at 3009-628 (providing that amended definition of "aggravated felony" applies regardless of "when the *conviction* occurred") (emphasis added); IIRIRA § 322(c), 110 Stat. at 3009-629 (providing that new definitions of "conviction" and "term of imprisonment" shall apply "to *convictions* and *sentences* entered before, on, or after the date of the enactment of this Act") (emphasis added); IIRIRA § 324(c), 110 Stat. at 3009-629 (providing that provision governing re-entry of deported aliens applies to "*departures* that occurred before, on, or after the date of enactment" of IIRIRA) (emphasis added); IIRIRA § 347(c), 110 Stat. at 3009-

639 (providing that provision rendering an alien deportable because he or she voted in violation of the law is applicable to "*voting* occurring before, on, or after the date of the enactment of this Act.") (emphasis added). Indeed, that Congress knew how to explicitly make an IIRIRA provision applicable to "convictions and sentences entered before, on, or after the date of the enactment of the Act," is demonstrated by IIRIRA § 321(c) and IIRIRA § 322(c). Because Congress made some provisions specifically applicable to prior convictions but did not do so in regard to IIRIRA § 304, it appears that Congress did not definitively decide the issue of § 304's retroactive application to pre-enactment convictions.

The INS notes that the removal ground underlying St. Cyr's proceedings, made applicable by IIRIRA, renders aliens subject to removal proceedings if they were "*convicted* of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii) (1999) (emphasis added). The INS argues that the use of past-tense language to qualify the timing of a deportable conviction shows that Congress clearly intended that an alien, such as St. Cyr, who committed his or her crime and was convicted prior to IIRIRA's April 1, 1997, effective date would become subject to removal proceedings in which § 212(c) relief is no longer available.

We are not persuaded that the use of the past tense in INA § 237 is an indication that Congress intended IIRIRA § 304 to apply retrospectively. A similar argument was considered and rejected by the Supreme Court in *Martin v. Hadix*, 527 U.S. at 354-55. There, the Court considered the retroactivity of the Prison

Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(d)(3), which limited the fees available to prisoners' attorneys who were monitoring prisons post-judgment. *See Martin*, 527 U.S. at 347. The petitioners argued that the language of § 803(d)(1)—"[i]n *any* action *brought* by a prisoner who is confined [to a correctional facility] . . . attorney's fees . . . shall not be awarded"—clearly expressed a congressional intent that § 803(d) apply to pending cases. *Id.* at 2003-4 (emphasis added). The Court rejected the argument that Congress's use of a past-tense verb clearly indicated Congress's intent that the provision apply to pending cases. The Court reasoned that § 803(d)(1) "define[s] the substantive availability of attorney's fees; [it] [does] not purport to define the temporal reach of these substantive limitations." *Id.* at 354. Thus, the Court concluded that the language fell short of demonstrating a clear congressional intent to apply § 803(d) retrospectively to pending cases and that had Congress intended the provision to apply to all fee orders, including those compensating work performed before the effective date, "it could have used language more obviously targeted to addressing the temporal reach of that section." *Id.*

Under the reasoning of *Martin*, the use of a past-tense verb in INA § 237(a)(2)(iii) is not dispositive of Congress's intent to apply IIRIRA § 304 retroactively to pre-enactment convictions. The language "convicted of an aggravated felony" in INA § 237(a)(2)(iii) is used to describe the substantive availability for removal from the United States. It is not used to describe the retrospective application of IIRIRA § 304. We therefore cannot and will not rely on the text of INA § 237(a)(2)(A)(iii) to hold that IIRIRA § 304 applies in

cases where an alien pled guilty to the underlying deportable crime prior to IIRIRA's enactment.

This is not to say that the INS's argument is not sophisticated. In *Salahuddin*, this Court relied on a similarly formulated argument to hold that Congress clearly intended that a statute be applied prospectively. 174 F.3d at 274-75. In that case, the appellant argued that the exhaustion requirement of 42 U.S.C. § 1997e(a), as amended by the PLRA, should not apply to an action pending at the time of its enactment. *See id.* at 272. Because the new provision provided that no action "shall be brought" until administrative remedies are exhausted, we concluded that a plain reading of the statute made it clear that Congress intended it to be applied prospectively. *Id.* at 274. We reasoned there that the use of the future tense in the provision was sufficient evidence of Congress's intent to apply the statute prospectively. *See id.* at 274-75. An interpretation that supports the application of a statute prospectively, however, does not justify its retroactive application. *See id.* at 275 (distinguishing between interpretations justifying prospective and retroactive applications); *see also Goncalves*, 144 F.3d at 129 (refusing to require that Congress draft an explicit effective date provision to insure against retroactive application because that rule would reflect a presumption in favor of retroactive application). The longstanding presumption is *against*, not in favor of, the retroactive application of a statute to pre-enactment conduct. *See Landgraf*, 511 U.S. at 265. Were we to infer from the sole use of a tense that Congress intended the IIRIRA § 304 bar to apply to past conduct, we would reverse this established presumption. Therefore, although we interpreted a 42 U.S.C. § 1997e(a) in *Salahuddin* to

apply prospectively based on the use of future tense phraseology, the presumption against retroactive application requires a more explicit statement from Congress to interpret IIRIRA § 304 to apply retroactively.[5]

In sum, we conclude that there is no clear evidence that Congress considered and decided whether IIRIRA § 304's bar to relief from removal applies retrospectively to removal proceedings commenced after IIRIRA's enactment against an alien who pled guilty to the underlying criminal conduct before its enactment. The requirement that Congress "first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511

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[5] St. Cyr, relying on a brief submitted in the consolidated cases, *Calcano-Martinez v. INS*, Civ. Nos. 99-4033; 98-4214; 98-4246 (2d Cir. [Sept. 1, 2000]), agrees that IIRIRA lacks an express directive that the statute apply retrospectively and contends that IIRIRA reveals Congress's explicit intent that "cancellation of removal" be applied only to those cases involving post-enactment convictions. According to St. Cyr, the absence of specific retrospective language in IIRIRA § 304, when such language is used in other IIRIRA provisions, requires the court to infer by negative implication that Congress clearly intended IIRIRA § 304 to apply prospectively. We disagree. The provisions for which Congress expressly provided a retroactive temporal reach cover distinct subject matters that are too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304. *See Martin*, 527 U.S. at 356-57. In addition, the effective date provision in IIRIRA § 309(a), although it does not make IIRIRA § 304 retroactive to pre-enactment convictions, does render Congressional intent ambiguous. Therefore, we decline to infer from this lack of guidance that Congress intended IIRIRA § 304 to apply only prospectively and hold that Congress's intent as to the section's temporal reach is ambiguous.

U.S. at 268. The statutory language does not convince us, and the INS has pointed to no legislative history in support of the conclusion, that Congress specifically considered the precise issue whether IIRIRA § 304 should be applied to an alien who rendered a pre-enactment guilty plea. Therefore, we hold Congress's intent with respect to the application of IIRIRA § 304 to pre-enactment convictions is unclear.[6]

2. Retroactive Effect.

Having concluded that no clear congressional intent exists as to whether AEDPA § 440(d) or IIRIRA § 304

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[6] In some cases, the interest in avoiding constitutional questions will cause a court to refrain from applying a statute retroactively. *See Landgraf*, 511 U.S. at 267 n.21 (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976)). Our holding in this case is guided, in part, by that principle. Even when Congress clearly intends that legislation is to be applied to past conduct, Congress's broad power to enact retroactive legislation does not go completely unchecked. The Fifth Amendment's Due Process Clause places a narrow limit on Congress's power to sweep away citizens' settled expectations under the law. The Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual. *See Landgraf*, 511 U.S. at 266; *Pottinger*, 51 F. Supp. 2d at 361 (the presumption against retroactivity "reflects our enduring commitment to the protection of the unpopular and the voiceless from the retributive and vindictive use of retroactive legislation."). Because, in our view, a profound constitutional question would arise under the Fifth Amendment's Due Process Clause were we to interpret IIRIRA as precluding the availability of § 212(c) relief in cases where an alien pled guilty or *nolo contendere* in reliance on the availability of § 212(c) relief, our ruling today that IIRIRA § 304 does not apply retroactively to pre-enactment guilty pleas avoids this result.

apply to an alien who pled guilty to a removable crime prior to the statute's enactment, we must determine whether a bar to relief has any retroactive effect. *See Landgraf*, 511 U.S. at 280; *Hughes Aircraft*, 520 U.S. at 946. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. Rather, our inquiry requires a "common sense, functional judgment" to determine "whether the new provision attaches new legal consequences to events completed before its enactment." *Martin*, 527 U.S. at 357-58 (quoting *Landgraf*, 511 U.S. at 270). A statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" has retroactive effect. *Landgraf*, 511 U.S. at 280.

We are the first U.S. Court of Appeals to consider whether applying IIRIRA § 304 to pre-enactment convictions is impermissibly retroactive. A number of our sister courts, however, have considered the similar question of whether the scope of AEDPA § 440(d) extends to deportation proceedings that involve convictions or guilty pleas that occurred prior to the AEDPA's enactment. The Tenth, Fifth, and Third Circuits have analyzed whether AEDPA § 440(d) was retroactive as applied to aliens whose criminal convictions occurred prior to the AEDPA's effective date. *See Jurado-Gutierrez*, 190 F.3d at 1147; *Requena-Rodriquez*, 190 F.3d at 306; *DeSousa*, 190 F.3d at 185. Having found that Congressional intent to apply AEDPA § 440(d) retrospectively was ambiguous, these Courts, adopting the INS's position, determined that there existed no impermissible retroactive effect in

applying AEDPA § 440(d) to pre-enactment convictions. *See Jurado-Gutierrez*, 190 F.3d at 1150-52; *Requena-Rodriquez*, 190 F.3d at 307-8; *DeSousa*, 190 F.3d at 187.

In three very recent cases, the First, Fourth, and Ninth Circuits had occasion to consider specifically whether AEDPA § 440(d) reached backward to cover a pre-enactment guilty or *nolo contendere* plea to an otherwise qualifying offense. *See Mattis*, 212 F.3d at 37; *Tasios*, 204 F.3d at 551; reh'g *en banc* denied, *Tasios v. Reno*, No. 99-6061 (9th Cir.) (May 25, 2000); *Magana-Pizano*, 200 F.3d at 612. In these cases, the relevant conduct for the retroactive determination was specifically a guilty or *nolo contendere* plea. The Fourth Circuit concluded that application of AEDPA § 440(d)'s bar on discretionary relief previously afforded by INA § 212(c) to guilty pleas made before the AEDPA's enactment "would upset reasonable, settled expectations and change the legal effect of prior conduct." *Tasios*, 204 F.3d at 552. Accordingly, that Circuit adopted a blanket rule that AEDPA § 440(d) does not apply retroactively. *See id.* The First and Ninth Circuits, adopting a middle ground, determined that AEDPA § 440(d) should not apply to an alien who can make a specific showing that he or she entered a guilty or *nolo contendere* plea in reliance upon the relief afforded by INA § 212(c). *See Mattis*, 212 F.3d at 39-40; *Magana-Pizano*, 200 F.3d at 613-14.

Finally, the Seventh Circuit has developed an approach that is in accord with the decisions of the First and Ninth Circuits. It has announced a general rule that AEDPA § 440(d)'s bar on INA § 212(c)'s discretionary relief applies retroactively to pre-enactment

guilty pleas. *See LaGuerre*, 164 F.3d at 1041; *Turkhan*, 188 F.3d at 827. It has also, however, identified a particular set of circumstances where applying AEDPA § 440(d) to past conduct would have an impermissible retroactive effect. Under the law of the Seventh Circuit, AEDPA § 440(d) applies retrospectively unless an alien actually had conceded deportability, despite a colorable defense, in reliance upon receiving a § 212(c) waiver. *See Turkhan*, 188 F.3d at 827; *Morales-Ramirez v. Reno*, 209 F.3d 977, 982 (7th Cir. 2000).

We conclude that AEDPA § 440(d) and IIRIRA § 304 as applied to a guilty or *nolo contendere* plea that predates the statutes' enactment has an impermissible retroactive effect. In so holding, we follow the reasoning of the Fourth Circuit in *Tasios v. Reno* that such an application of the bar to relief would upset settled expectations and change the legal effect of prior conduct.

As an initial matter, we note that it is difficult to argue that barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct—as opposed to a plea going to the guilt of a deportable crime—constitutes an impermissible retroactive application of a statute. Indeed, we agree that,

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

Jurado-Gutierrez, 190 F.3d at 1150-51 (quoting *La-Guerre*, 164 F.3d at 1041). Thus, we conclude that the bar to discretionary relief applies regardless of whether a legal permanent alien's underlying criminal conduct pre-dated the AEDPA or IIRIRA.

However, in *Hughes Aircraft*, the Supreme Court conducted a retroactivity analysis that was not focused solely on the petitioner's primary conduct, but also on the relevant secondary conduct. *See* 520 U.S. at 947-48. Furthermore, "it is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." *Mattis*, 212 F.3d at 37. Thus, in considering whether the changes to the availability of discretionary relief would alter the legal effect of conduct that predates the AEDPA and IIRIRA's enactment, our analysis focuses on the decision to enter a guilty plea to a crime—not on the criminal conduct—that qualifies the alien for removal under the immigration laws.

A "legal change that would have an impact on private parties' planning" triggers the presumption against retroactivity. *See Landgraf*, 511 U.S. at 282-83. A number of courts have documented that "an alien charged with a crime [making him eligible for deportation] would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial. . . ." *Tasios*, 204 F.3d at 552 (quoting *Magana-Pizano*, 200 F.3d at 612); *see also Pottinger v. Reno*, 51 F. Supp. 2d. 349, 362-63 (E.D.N.Y. 1999); *Wallace v. Reno*, 24 F. Supp. 2d 104, 110 (D. Mass. 1998), *aff'd* 194 F.3d 279 (1st Cir. 1999); *Mojica v. Reno*, 970 F.Supp. 130, 177 (E.D.N.Y. 1997), *aff'd in part, dismissed in part*, *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998);

Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996).

As the Amici[7] in this case demonstrate, a legal resident who is charged with a crime that renders him removable from the United States carefully considers the immigration consequences of his or her conviction and, specifically, the availability of discretionary relief from removal. It is not unreasonable to attribute knowledge of the availability of relief to a legal resident because it is a common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea. Additionally, an attorney's professional duty to his or her client includes advising that client of the immigration consequences of a plea or conviction. *See Magana-Pizano*, 200 F.3d at 612; *see also ABA Standards for Criminal Justice*, Pleas of Guilty, Standard 14-3.2, commentary at 75 (2d ed. 1982) (providing that where it is apparent that a defendant faces deportation as a result of conviction, counsel "should fully advise the defendant of these consequences."); *National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation*, Guideline 6.2(a)(3) and commentary (1994) (recognizing that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation."). A criminal defense law treatise provides that:

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[7] In regard to this point, Amici include The Legal Aid Society of the City of New York, The New York State Association of Criminal Defense Lawyers, and the New York State Defenders Association. These briefs were submitted in *Calcano-Martinez v. INS*, Civ. Nos. 99-4033; 98-4214; 98-4246 (2d Cir. 2000).

> Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. Thus, the immigration consequences of a prosecution may totally alter the strategies chosen . . . a[ny] attorney who suspects that this client is an alien has a duty to inquire and to protect his client's immigration status. Pleas and admissions must be approached with caution and with knowledge of the consequences. . . .

3 *Bender's Criminal Defense Techniques* (1999) § 60A.01 and § 60A.2[2]. Furthermore, lawful permanent residents are typically part of a resident alien community and are likely aware of what happens to other members of the community who engage in criminal conduct. *See Pottinger*, 51 F. Supp. 2d at 363.

There is also little doubt that before the AEDPA and IIRIRA were enacted, an alien's reliance on the possibility of receiving a waiver of deportation was reasonable because there was a strong possibility that he or she would receive relief. *See Tasios*, 204 F.3d at 551 ("in the years immediately preceding the enactment of AEDPA, immigration judges and the BIA granted over half of the § 212(c) applications they decided"). When a request was denied, an alien could petition a court of appeals for review and, "on a nontrivial number of occasions," these denials were overturned. *See id.* at 551-52 (quoting *Reyes-Hernandez*, 89 F.3d at 492).

When, in March of 1996, St. Cyr pled guilty to his drug-trafficking offense, he and legal residents in his position were removable from the United States. He and others like him, however, could depend on the availability of a hearing to determine his eligibility for

relief from removal. Given the dramatic impact removal would have on a legal resident's life, it is likely that a legal resident would, because of the possibility of receiving a lighter sentence, only decide to concede guilt to a crime that renders him or her removable in order to be eligible to apply for relief from removal. Under the law today, this settled expectation is upset dramatically. For certain classes of aliens, there is currently no reason to forgo fighting the conviction of a qualifying crime and enter a plea because, pursuant to the AEDPA and IIRIRA, there is no possibility of relief from removal as a result of the plea.

"[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. Because there is sufficient evidence that a legal resident accused of a crime that renders him or her removable from this country would have conformed his or her conduct according to the availability of relief when he or she pled guilty, AEDPA § 440(d) and IIRIRA § 304 would severely upset settled expectations were it applied retroactively to pre-enactment guilty pleas. A repeal of the eligibility to apply for relief from removal would attach new legal consequences to a legal resident's guilty plea to a removal crime. Therefore, AEDPA § 440(d) and IIRIRA § 304 have an impermissible retroactive effect as applied to pre-enactment guilty pleas.

We are not persuaded that, as the INS argues, because the bar to relief can be described as a new jurisdictional rule—in that it gives the Attorney General jurisdiction to grant a waiver in her discretion—it automatically has no retroactive effect. It is true

that a change in law that "speak[s] to the power of the court rather than to the rights or obligations of the parties" may be applied in a case without raising concerns that it is impermissibly retroactive. *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S. Ct. 554, 121 L.Ed.2d 474 (1992) (Thomas, *J.* concurring). In *Hughes Aircraft*, however, the Supreme Court explained that a jurisdictional statute that does not "merely address [ ] *which* court shall have jurisdiction to entertain a particular cause of action" but, rather, affects "*whether* [a claim] may be brought at all" should not presumptively be given retroactive effect. 520 U.S. at 951. AEDPA § 440(d) and IIRIRA § 304 do not merely change the degree of deference to be afforded a § 212(c) request or change the judicial or administrative forum in which relief may be granted. Rather, they alter the substantive rights of aliens subject to removal proceedings because it eradicates a form of relief previously available. By their terms, AEDPA § 440(d) and IIRIRA § 304 attach new substantive legal consequences to a guilty or *nolo contendere* plea to a deportable crime and would have an impermissible retroactive effect if applied to pre-enactment pleas.

Our conclusion here is consistent with the law of this Circuit. In *Buitrago-Cuesta*, we considered a 1990 amendment to INA § 212(c) which precluded an alien who had "been convicted of an aggravated felony and has served a term of at least 5 years" from seeking a discretionary waiver from deportability. *See* 7 F.3d at 292. The petitioner in that case argued that because at the time of his conviction his crime was not defined as an "aggravated felony," the 1990 amendment should not apply to his deportation proceeding commenced prior to

the amendment. *See id.* We decided that Congress intended that the 1990 amendment be applied retrospectively. *See id.* at 295. Since we decided *Buitrago-Cuesta*, however, the Supreme Court has decided *Landgraf*, *Hughes Aircraft*, and *Martin*, cases that honed retroactivity principles. *See id.* at 293 ("[at time of decision] [t]he Supreme Court's position on the retroactivity of civil statutes is somewhat unclear."). Moreover, the petitioner in *Buitrago-Cuesta* did not pled guilty to a deportable crime but instead was convicted after a jury trial in state court. *See id.* at 293. Therefore, our ruling today that the 1996 amendments insofar as they bar relief afforded prior to their enactment have a retroactive effect as applied to pre-enactment guilty pleas—a situation where an alien is likely to strategize according to the availability of discretionary relief—does not contradict our earlier ruling in *Buitrago-Cuesta*.

The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of *nolo contendere* because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime. Discretionary relief as amended by AEDPA § 440(d) still applies to all aliens with convictions predating its enactment and to all guilty pleas entered after its effective date. Likewise, cancellation of removal still applies to all aliens with convictions pre-

dating IIRIRA and to all guilty pleas entered by aliens to deportable crimes after it took effect.

CONCLUSION

In sum, we hold that the district court had habeas corpus jurisdiction under 28 U.S.C. § 2241 to review St. Cyr's challenge to the BIA's interpretation of AEDPA § 440(d) and IIRIRA § 304. On the merits, we hold that the bar on applying for relief enacted in AEDPA § 440(d) and IIRIRA § 304 does not apply to an alien who pled guilty or *nolo contendere* to an otherwise qualifying crime prior to IIRIRA's enactment date. Because we determine that these laws do not apply retroactively to St. Cyr, we do not decide his constitutional challenges. The district court is affirmed insofar as it held that the bar to discretionary relief from removal does not apply to guilty and *nolo contendere* pleas entered before IIRIRA's enactment.

JOHN M. WALKER, Jr., *Circuit Judge, Dissenting:*

Because I find Congress's intent plain on the face of the statute not to permit withholding of deportation or, in the parlance of the new law, cancellation of removal to aliens in appellee's position, I respectfully dissent.

There is no doubt that it is within Congress's power to redefine what will subject an alien to removal, *see Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976), and that Congress may effect such changes to require removal of an alien who would not have been subject to removal before the changes became effective,[8] *see United States v. Koziel*, 954 F.2d 831, 834 (2d Cir. 1992) (upholding retroactive repeal of Judicial Recommendations Against Deportation for certain criminal aliens); *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 99 L.Ed. 1107 (1955) (permitting deportation based on conviction that would not have been a basis for deportation when the crime was committed). Indeed, there is a long tradition of Congress retroactively changing the qualifications for aliens' con-

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[8] The majority hints that removing 8 U.S.C. § 1182(c) ("§ 212(c)") relief retroactively would raise "a profound constitutional question." *Supra* at [24 n.6]. I share no such concern. Congress's plenary power to define the conditions of aliens' continued residence in this country gives Congress the authority to remove § 212(c) relief, as advocated by the INS. I do not dispute the general presumption against the retroactive application of congressional enactments, especially where the rights of "an unpopular group or individual" are affected. *Id.* But this is not an issue of constitutional dimension. Accordingly, I share the view of the majority, as expressed in the body of its opinion, that our inquiry here is governed by retroactivity analysis and not by the canon of construction requiring us to avoid constitutional questions.

tinued residence in the United States. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 593, 72 S. Ct. 512, 96 L.Ed. 586 (1952); *Mahler v. Eby*, 264 U.S. 32, 39, 44 S. Ct. 283, 68 L.Ed. 549 (1924); *Bugajewitz v. Adams*, 228 U.S. 585, 592, 33 S. Ct. 607, 57 L.Ed. 978 (1913). While there is little doubt that Congress may alter the requirements for continued residence in this country, identifying when Congress has chosen to exercise its power retroactively has proven a more difficult problem and it is here that my views diverge from those of my colleagues.

The majority's opinion has correctly identified the nature of the inquiry that we must undertake. *See supra* [13a-14a] (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). The threshold question in the *Landgraf* framework is whether Congress has expressly provided for a statute's retroactive application. If so, our inquiry is at an end. *See id.*; *Martin v. Hadix*, 527 U.S. 343, 352, 119 S. Ct. 1998, 144 L.Ed.2d 347 (1999). The majority has found ambiguity in the temporal reach of Congress's repeal of § 212(c) relief for criminal aliens. I disagree.

I believe that Congress's intent is clear on the face of the statute and that IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.* (1996), has removed the availability of § 212(c), or equivalent relief, from criminal aliens like the petitioner here, regardless of when they entered their guilty pleas. This plain congressional intent is evident from IIRIRA's general statutory framework and its comprehensive method of implementation. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997) ("The plainness or ambiguity of statutory language is to be deter-

mined by reference to the language itself, the specific context in which that language is used, *and the broader context of the statute as a whole.*" (emphasis added)).

IIRIRA § 309 fixed April 1, 1997 as IIRIRA's effective date. *See* 110 Stat. at 3009-625. While § 309 contains a general savings clause listing those aliens for whom IIRIRA does not apply as of its effective date, none of those exceptions are relevant here. *See* § 303(b)(2), 110 Stat. at 3009-586; § 242(g), 8 U.S.C. § 1252(g); § 306(c), 110 Stat. at 3009-612; §§ 308(d)(2)(D) & (d)(5), 110 Stat. at 3009-617, 619. Moreover, Congress, intending that IIRIRA be a complete break from the past, enacted transitional provisions that would operate during a phase-in period ending on IIRIRA's effective date. *See Calcano-Martinez v. Reno*, Civ. Nos. 98-4033, 98-4214, 98-4246, at [50a-54a] (describing IIRIRA's transitional rules). This legislative scheme of transitional provisions followed by permanent legislation can be reduced to one essential point relevant to IIRIRA's repeal of § 212(c): Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997, except where it expressly exempted those provisions that were not meant to apply as of that date. The provision repealing § 212(c) was not one of them. Included in the provisions generally effective as of April 1, 1997 is § 304(b), repealing § 212(c), and § 304(a), replacing § 212(c) with new provisions entitled "Cancellation of Removal." *See* § 304, 110 Stat. at 3009-594-97. The new cancellation of removal proceedings exclude specified classes of criminal aliens, including the petitioner here, from seeking discretionary relief.

Congress could not have been more express about its intent to have IIRIRA apply to all aliens against whom deportation or removal proceedings were not yet pending as of April 1, 1997. *See generally* § 309. If, as petitioner necessarily concedes, it is IIRIRA and not the old INA that subjects him to removal, then it is IIRIRA's provisions that provide for the limits of judicial review and for cancellation of removal proceedings. I need look no farther to find that Congress made express its intention to disallow the relevant aliens against whom removal proceedings were filed after April 1, 1997 from seeking the protection of § 212(c) relief. Because petitioner falls generally within IIRIRA's provisions, he is subject to IIRIRA's "Cancellation of Removal" proceedings—from which, because of his criminal past, he is expressly excluded—and does not have access to § 212(c) relief.

The majority discounts this argument, suggesting that it is based on nothing more than the statute's effective date and that such reasoning is impermissible because of the pronouncement in *Landgraf* that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. But the Court's statement in *Landgraf* is inapplicable here. Changes to the Civil Rights Act of 1991, at issue in *Landgraf*, created new rights of employees "to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964," *id.* at 247, and the Court had to decide only whether a Title VII plaintiff whose suit was on appeal when the 1991 Act was enacted should be retroactively entitled to the Act's punitive damages provisions. In that context, the

fact that the 1991 Act was enacted on November 21, 1991 did not help the Court to decide whether it was intended to apply to claims predating the Act. But here, where the entirety of the new IIRIRA applies generally to the petitioner— indeed, if it did not, he would not be subject to removal at all—IIRIRA's complex provisions governing its effective dates are squarely relevant to determining the extent of IIRIRA's application as to him. In my view, these provisions plainly provide that petitioner is not entitled to § 212(c) relief.

The awkward statutory patchwork sewn together by the majority from scraps of IIRIRA and the former INA reveals Congress could not have intended the majority's conclusion. The majority's opinion faces insurmountable hurdles even on a linguistic level. The petitioner here is subject to removal under the new IIRIRA. With this opinion, the majority has permitted petitioner access to a waiver of deportation hearing under § 212(c) that was part and parcel of a statutory scheme that no longer exists. Under IIRIRA, there is no such thing as deportation that can be waived. In order to reach the result they want, the majority has effectively taken a provision that they like from a statute that has been substantially replaced, and grafted it onto the replacement.

Insofar as the *Landgraf* presumption against retroactivity is a canon of construction that permits us to divine the intent of Congress, I cannot concur in a conclusion that flies so indisputably in the face of Congress's express denial of cancellation of removal hearings for this alien. Combined with what I think are compelling expressions of Congress's actual intent to

repeal § 212(c) retroactively as to the broader class of criminal aliens described in IIRIRA § 304, I respectfully dissent from my colleagues' view that § 304 may only be applied prospectively to pleas antedating IIRIRA's enactment.

Because Congress's intent is plain on the face of the statute, I see no reason to reach the second step of the *Landgraf* analysis which requires us to determine whether IIRIRA's provisions governing cancellation of removal have genuine retroactive effect. Nevertheless, if I were to reach *Landgraf's* second step, I would conclude that provisions denying cancellation of removal do not operate retroactively. I believe that analysis of this question should be governed by cases arising in the context of the substantially analogous 1990 amendment to the INA.

The 1990 amendment limited the relief afforded by § 212(c)'s waiver of deportation by excluding aggravated felons who were sentenced to terms of imprisonment of at least five years. In holding that the 1990 amendment did not have a retroactive effect, the Ninth Circuit persuasively held that "[c]ongressional repeal of a discretionary power to relieve an alien from deportation does not attach any new legal consequences to the pre-enactment events." *Samaniego-Meraz v. INS*, 53 F.3d 254, 256 (9th Cir. 1995). As in the present case, "the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation." *Scheidemann v. INS*, 83 F.3d 1517, 1523 (3d Cir. 1996). "In general, the concern regarding retroactive application of statutes is the deprivation of rights without notice and fair warning;

such concerns are not present in this case . . . . In this case, Congress did not attach additional consequences [to past criminal activity] but merely withdrew a previously available form of discretionary relief." *Id.* (quoting *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)) (alterations in original). True retroactivity would occur if IIRIRA revoked § 212(c) relief from those who had received it prior to IIRIRA's effective date. IIRIRA § 304(b), like the 1990 amendment, "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." *De Osorio*, 10 F.3d at 1042.

As of IIRIRA's April 1, 1997 effective date, Congress plainly changed the category of aliens who thereafter may seek cancellation of removal, and I disagree that the new scheme has a genuinely retroactive effect. Accordingly, I would conclude that the *Landgraf* presumption against retroactivity has no effect on our analysis. In the absence of any such presumption against retroactivity, our more traditional tools of construction apply, including the usual deference afforded to agency interpretations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, even were I to agree that the temporal reach of § 304(b) is ambiguous, I still believe that petitioner here would not be entitled-to withholding of deportation or cancellation of removal proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 98-4033, 98-4214, 98-4246

DEBORIS CALCANO-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

SERGIO MADRID, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

FAZILA KHAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Decided: Sept. 1, 2000]

Before: OAKES, WALKER, and KEITH,*
Circuit Judges.

OAKES, *Senior Circuit Judge*:

The consolidated cases before the Court require us to interpret the effect of the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), on the jurisdiction of federal courts to hear challenges raised by criminal aliens with respect to removal proceedings commenced by the Immigration and Naturalization Service ("INS"). In three opinions handed down in the last three years, we considered the effect of various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the transitional rules of IIRIRA on a federal court's jurisdiction to review removal proceedings. This is our first occasion to examine the effect of IIRIRA's permanent rules in the same context.

In enacting the AEDPA and IIRIRA in 1996, Congress reworked the role of the courts in immigration decisions by severely limiting judicial review of final orders of deportation for certain classes of aliens. By enacting these laws, Congress clearly meant to speed the removal of legal permanent residents convicted of certain crimes from the United States by curtailing the availability of judicial review of their removal orders. *See* H. R. Rep. No. 104-879 at 251-61 (1997), 1997 WL 9288; H.R. Conf. Rep. No. 104-828, at 495-507 (1997),

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

1997 WL 563320. In our first decision interpreting Congress's 1996 amendments, we held that the AEDPA "repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]." *Hincapie-Nieto v. INS*, 92 F.3d 27, 28 (2d Cir. 1996). Two years later, we held that under the transitional rules of IIRIRA, federal courts retained habeas jurisdiction under 28 U.S.C. § 2241. *See Jean-Baptiste v. Reno*, 144 F.3d 212, 220 (2d Cir.), *reh'g denied*, 175 F.3d 226 (2d Cir. 1998). Four months after our decision in *Jean-Baptiste*, we examined the scope of the remaining habeas review and held that federal courts retained jurisdiction to review statutory and constitutional challenges to deportation orders. *See Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999).

The three petitioners before us, Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan, are legal permanent residents of the United States who have been ordered deported because of prior criminal convictions. Each has filed a petition for review in this Court pursuant to INA § 242(a)(2), codified at 8 U.S.C. § 1252(a)(2), challenging the final orders of removal entered against them by the Board of Immigration Appeals ("BIA"). Each petitioner has also filed a petition for habeas corpus in a United States district court. The petitions of Calcano-Martinez and Madrid were dismissed without prejudice to refiling after this Court's mandate in the present case, and Khan's petition is pending in the Eastern District of New York. On appeal, the petitioners do not dispute that they are aliens with criminal convictions that render them deportable under the Immigration and Naturalization

Act ("INA"). Rather, they raise statutory challenges to the Attorney General's interpretation of the immigration laws under which they face deportation and constitutional challenges to the statute itself.

The INS argues that this Court does not have jurisdiction to hear these petitions. We hold, for the reasons set forth herein, that INA § 242(a)(2)(C) bars this Court from reviewing claims against final orders of removal filed by certain classes of criminal aliens, including the petitioners. We also hold that IIRIRA's permanent rules do not repeal a federal court's jurisdiction to review criminal aliens' removal orders by writ of habeas corpus under 28 U.S.C. § 2241. In doing so, we follow decisions by the Third and Ninth Circuit Courts of Appeals and the principles set forth in our prior cases interpreting the immigration laws. Accordingly, we dismiss the petitions without prejudice to the same claims being brought pursuant to habeas petitions.

I. BACKGROUND

A. Deboris Calcano-Martinez.

Deboris Calcano-Martinez is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971, when she was three years old. She has four children who are United States citizens. On October 9, 1996, Calcano was sentenced to one to three years' imprisonment based on her April 24, 1996, guilty plea to attempted criminal sale of heroin in the third degree, in violation of §§ 110 and 220.39 of the New York Penal Law.

On June 16, 1997, the INS commenced removal proceedings against Calcano-Martinez by filing a Notice to Appear. *See* 8 C.F.R. § 239.1(a) (1999). The notice charged that Calcano-Martinez's narcotic conviction rendered her deportable from the United States pursuant to INA §§ 237(a)(2)(A)(iii) and (a)(2)(B)(i), codified at 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i) (1999), as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law.[9]

A removal hearing, at which Calcano-Martinez was represented by counsel, was held before an Immigration Judge ("IJ"). At the end of the hearing, the IJ ordered Calcano-Martinez deportable as charged by the INS and ruled that, based on her criminal convictions, she was statutorily ineligible for any relief from removal. Calcano-Martinez timely appealed the IJ's decision to the BIA. The BIA dismissed her appeal. On January 29, 1998, Calcano filed a petition for review in this Court. On October 13, 1999, Calcano filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *See Calcano-Martinez v. Reno*, No. 99 Civ. 10481 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Calcano's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[9] INA § 237(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(B)(i) states that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

B. Sergio Madrid.

Sergio Madrid is a native and citizen of Mexico who remained in the United States unlawfully until his status was adjusted to lawful permanent resident of the United States at the age of seventeen. On September 6, 1994, Madrid was sentenced to a prison term of four years to life based on his conviction for the criminal sale of a controlled substance in the second degree, in violation of § 220.41 of the New York Penal Law.

On June 24, 1997, the INS commenced removal proceedings against Madrid by filing a Notice to Appear. The notice charged that Madrid's narcotic conviction rendered him deportable from the United States as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i); 8 U.S.C. § 1101(a)(43).[10] A removal hearing was held before an IJ and at the close of the hearing, the IJ rendered Madrid deportable. Madrid appealed the BIA's decision and on May 4, 1998, the BIA dismissed his appeal. On June 4, 1998, Madrid filed a petition for review in this Court. On October 13, 1999, Madrid filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *Madrid v. Reno*, No. 99 Civ. 10482 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Madrid's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[10] INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43), defines "aggravated felony" as a crime involving "illicit trafficking in a controlled substance."

C. Fazila Khan.

Fazila Khan is a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident on September 2, 1987. Khan's family, including her mother and sister as well as five of her aunts and uncles, are also United States citizens. She also has a four-year-old daughter who is a United States citizen. On February 13, 1997, Khan was sentenced to a prison term of four months, to be followed by a period of supervised release for one year, in connection with her November 6, 1996, guilty plea to the use of a telephone to facilitate the distribution of heroin in violation of 21 U.S.C. §§ 843(b), (d).

In May 1997, the INS commenced removal proceedings against Khan by filing a Notice to Appear. The notice charged that her offense rendered her deportable as an alien convicted of an aggravated felony. *See* INA § 237(a)(2)(A)(iii), codified at 8 U.S.C. § 1127(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(B).

A removal hearing was held before an IJ and Khan, represented by counsel, denied that she was deportable as charged. On July 24, 1997, the IJ ordered her deportable. Khan timely appealed the IJ's decision. On May 28, 1997, the BIA issued a decision dismissing Khan's appeal. On June 29, 1998, Khan filed a petition for review in this Court. On October 13, 1998, Khan also challenged her removal order by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. *Khan v. Reno*, No. CV 99-6515 (E.D.N.Y. filed Oct. 13, 1999). That petition is pending.

D. INA § 212(c) Waiver from Deportation.

Under former INA § 212(c), codified at 8 U.S.C. § 1182(c) (1996), the Attorney General had discretionary authority to waive the deportation of an alien deportable because of a prior conviction where deportation would cause extraordinary hardship to the deportee or his or her family. The permanent rules of IIRIRA, effective April 1, 1997, repealed § 212(c) in its entirety and replaced it with another form of relief entitled "cancellation of removal," found at new INA § 240A, codified at 8 U.S.C. § 1229b (1999). *See* IIRIRA §§ 304(a), (b), 110 Stat. at 3009-587-594. That relief, permitting the Attorney General to waive deportation for certain classes of aliens, is categorically not available to an alien convicted of a crime that qualifies as an "aggravated felony" under the statute. *See id.* The petitioners are each ineligible for "cancellation of removal" because their convictions qualify as "aggravated felonies" under the INA. *See* INA § 240A, codified at 8 U.S.C. § 1229b (1999); 8 U.S.C. § 1101(a)(43).

In their petitions for review to this Court, the petitioners argue that the BIA erred by interpreting IIRIRA § 304's repeal of § 212(c) relief and replacement with "cancellation of removal" to apply retroactively to an alien who is convicted before April 1, 1997, the effective date of IIRIRA § 304(a).[11] The petitioners further contend that if IIRIRA is interpreted to apply retroactively to pre-enactment convictions, § 304(a) of IIRIRA is unconstitutional because it violates their

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[11] At argument, counsel for the petitioners alternatively argued that IIRIRA §§ 304(a), (b) should not apply retrospectively to guilty pleas entered to deportable crimes prior to IIRIRA's effective date.

rights guaranteed under the due process and equal protection clauses of the U.S. Constitution.

II. DISCUSSION

We must consider whether we have jurisdiction over the petition before us. Implicit in this question is whether IIRIRA's permanent rules repealed habeas corpus jurisdiction to review final removal orders entered against a legal resident alien who is removable because of a prior conviction. *See Liang v. INS*, 206 F.3d 308, 312-13 (3d Cir. 2000) (noting the interrelationship between jurisdiction over a petition for review and habeas corpus). The permanent rules of IIRIRA are Congress's most recent enactment, in a line of many, on the subject of the judicial review available over immigration decisions. A complete discussion of the history of judicial review of immigration orders is set forth in this Court's decision in *Henderson*, 157 F.3d at 112-17. For our purposes on this appeal, it is necessary to begin with the 1996 amendments to the INA.

A. The AEDPA.

In April of 1996, Congress enacted the AEDPA, which included two provisions relevant to the judicial review of immigration decisions. Prior to the enactment of the AEDPA, INA § 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (1996). Section 401(e) of the AEDPA, entitled "Elimination of Custody Review by Habeas Corpus," explicitly repealed prior INA § 106(a)(10). *See* AEDPA § 401(e), 110 Stat. at 1268. Section 440(a) was enacted to replace the repealed provision and substitute the following language:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

AEDPA § 440(a), 110 Stat. at 1276-77, codified at 8 U.S.C. § 1105a(a)(10) (1996) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, September 30, 1996, with respect to deportation proceedings commenced after April 1, 1997).

In *Hincapie-Nieto*, 92 F.3d at 29-30, we held that § 440(a) repealed a court of appeals's pre-existing jurisdiction over petitions for review filed by aliens ordered deported because of the convictions specified. In holding that our jurisdiction over a petition for review was repealed, we noted that "[t]he absence of an opportunity for some aliens to file a petition for review in a court of appeals does not necessarily mean . . . that the federal courts are closed to all claims by such aliens arising in the course of deportation proceedings." *Id.* at 30. In *Hincapie-Nieto*, it was not necessary to determine whether district courts continued to have 28 U.S.C. § 2241 habeas jurisdiction over final deportation orders after the AEDPA. In dicta, however, we stated that no constitutional infirmity appeared to arise from AEDPA § 440(a)'s repeal of our jurisdiction because the INS assured that at least some avenue for judicial relief remained available through a challenge to detention by application for habeas corpus. *See id.* at 30-31.

Our suggestion in *Hincapie-Nieto* that AEDPA § 440(a)'s bar of judicial review under the INA was constitutional because courts might review deportation orders through habeas corpus petitions was in accord with the vast majority of courts of appeals to consider the same issue. *See Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Mendez-Morales v. INS*, 119 F.3d 738, 739 (8th Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-4 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668-70 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Salazar-Haro v.* INS, 95 F.3d 309, 311 (3d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

B. IIRIRA's Transitional Rules.

Five months after enacting the AEDPA, on September 30, 1996, Congress enacted IIRIRA, which further narrowed judicial review for legal residents ordered removable because they were convicted of certain crimes. IIRIRA contains two sets of provisions. The transitional rules (which are not codified in the U.S. Code) control deportation proceedings commenced prior to April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. Section 309(c)(4)(G) of IIRIRA's transitional rules is the successor to AEDPA § 440(a) and provides in more absolute language that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [the deportation proceedings of the INA]." IIRIRA § 309(c)(4)(G), 110 Stat. at 3009-626, codified at 8 U.S.C. § 1101 note (1999).

In addition, IIRIRA § 306(a) amends INA § 242(g) to provide:

> **Exclusive Jurisdiction.** Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

IIRIRA § 306(a), 110 Stat. at 3009-612, codified at 8 U.S.C. § 1252(g) (1999). Although INA § 242(g) is listed with the permanent provisions, IIRIRA § 306(c) makes § 242(g) applicable to both transitional and permanent rules cases. *See* IIRIRA § 306(c), 110 Stat. at 3009-612.

In *Jean-Baptiste*, 144 F.3d at 214-18, this Court considered whether INA § 242(g) divested federal courts of jurisdiction over a case where legal residents, ordered deported because of a criminal conviction, maintained that their right to due process was violated because they had never been given notice that their criminal conviction could subject them to consequences under the immigration laws. Finding that plaintiffs' claims arose out of "the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," this Court held that INA § 242(g) deprived federal courts of jurisdiction to hear plaintiffs' claims. *See id.* at 218.

We reasoned, however, that all review had not been eliminated by INA § 242(g) or the AEDPA. *See id.* Relying on the doctrine articulated in *Felker v. Turpin*, 518 U.S. 651, 659-61, 116 S. Ct. 2333, 135 L.Ed.2d 827

(1996), that repeal by implication of the right to petition for habeas corpus relief is disfavored, we held that:

> Nothing in the language of either the [AEDPA] or [IIRIRA] suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241 . . . .

Id. at 219. Therefore, in *Jean-Baptiste*, this Court concluded that the AEDPA and IIRIRA's transitional rules did not repeal the habeas jurisdiction granted to federal courts by Congress in 28 U.S.C. § 2241 to review challenges to final deportation orders. We left open the question of the scope of the habeas review of immigration decisions available under 28 U.S.C. § 2241. *See id.* at 220.

Our decision in *Jean-Baptiste* is in accord with the majority of circuits also to hold that the language of § 242(g) did not repeal habeas jurisdiction over immigration decisions. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals held that habeas jurisdiction to review final deportation decisions survived the AEDPA and IIRIRA transitional rules' streamline of the judicial review available under the INA. *See Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999); *Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999); *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 306 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999), *cert. denied*, *Palaganas-Suarez v. Greene*,

— U.S. ——, 120 S. Ct. 1539, 146 L.Ed.2d 352 (2000); *Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-37 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 119-23 (1st Cir. 1998), *cert. denied, Reno v. Goncalves*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999). Only the Seventh Circuit has held that the transitional rules of IIRIRA effected a repeal of habeas jurisdiction over final deportation orders. *See LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied, Reno v. LaGuerre*, — U.S. ——, 120 S. Ct. 1157, 145 L.Ed.2d 1069 (2000).

In *Henderson*, 157 F.3d at 118-22, we reaffirmed our synthesized holding of *Hincapie-Nieto* and *Jean-Baptiste* that under the INA, modified by the AEDPA and IIRIRA's transitional rules, an alien ordered deported because of a criminal conviction cannot seek a petition for review in the court of appeals but must pursue a claim in a habeas proceeding pursuant to 28 U.S.C. § 2241. Although the panel questioned the wisdom of having the channel for review be by habeas in the district court rather than by petition for review in the courts of appeals, it acknowledged that it was bound by a reasonable comprehension of the statute and Second Circuit precedent. *See id.* at 119 n.9; *see also Jean-Baptiste*, 175 F.3d at 226 (denying a subsequent petition for rehearing despite the *Henderson* panel's questioning).

We also considered in *Henderson* the breadth of review available under habeas corpus, the question left open after *Jean-Baptiste*. The INS argued that review only of "substantial" constitutional claims remained and

that the courts were without power to review the Attorney General's interpretation of the immigration laws. *See Henderson*, 157 F.3d at 119-20. We soundly rejected the INS's argument and held that federal courts have jurisdiction under 28 U.S.C. § 2241 to consider all claims that are purely legal in nature—including constitutional challenges and claims that the Attorney General misinterpreted the immigration laws. *See id.* at 122.

C. IIRIRA's Permanent Rules.

The permanent rules of IIRIRA govern deportation proceedings initiated after April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. The parties agree that because deportation proceedings were not initiated against any of the petitioners until after April 1, 1997, the permanent rules apply to their cases. The permanent rules revamp the INA by striking 8 U.S.C. § 1105(a) in its entirety and relocating the rules governing judicial review of deportation orders to 8 U.S.C. § 1252. *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612.

The INS argues that the court of appeals is the exclusive forum for all immigration matters, invoking several provisions of the permanent rules in support of its position that IIRIRA, in its final form, divests district courts of their habeas jurisdiction. The INS calls our attention to newly added INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), 242(g) and 242(b)(9). *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612. Section 242(a)(1) of the INA provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28 [the Hobbs Act] . . . .

8 U.S.C. § 1252(a)(1) (1999). The INS argues that because the Hobbs Act gives exclusive jurisdiction to the court of appeals, *see* 28 U.S.C. § 2342 ("The court of appeals . . . has exclusive jurisdiction" over specified agency orders), § 242(a)(1) evidences Congress's intent to eradicate habeas review.

Section 242(a)(2)(C) of the INA is the successor to AEDPA § 440(a) and IIRIRA § 309(c)(4)(g) and in its final form now states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [the deportation sections of the INA].

8 U.S.C. § 1252(a)(2)(C) (1999). The INS argues that when it added the "notwithstanding any other provision of law" phrase to the final incarnation of this section, Congress explicitly repealed habeas jurisdiction.

The INS also relies on INA § 242(e)(2). This section provides:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157, or has been granted asylum under section 1158, such status not having been terminated, and is entitled to such

> further inquiry as prescribed by the Attorney General pursuant to section 12255(b)(1)(C) of this title.

8 U.S.C. § 1252(e)(2) (1999). The INS contends that because INA § 242(e)(2) provides for statutory habeas review under the delineated circumstances, Congress knew how to create habeas review under the INA when it so desires. It follows, according to the INS, that Congress's decision to omit analogous language in regard to an alien's challenge to his or her final deportation order demonstrates its intent that this review be unavailable.

The INS additionally points to INA § 242(g), a section already considered by this Court in *Henderson*. Section 242(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. § 1252(g) (1999).

Finally, § 242(b)(9), upon which the INS rests its principal argument provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter

> shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (1999). The INS argues that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," § 242(b)(9) necessarily divests any court of jurisdiction other than the appropriate court of appeals. In support of this argument, the INS points to the Supreme Court's recent characterization in dicta of § 242(b)(9) as a "zipper clause" that channels all review of removal decisions under the INA into the court of appeals. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999) ("AADC").

Four courts of appeals have considered arguments similar to those presented by the INS in this case. The Fifth and Eleventh Circuit Courts of Appeals adopted the INS's position; the Third and Ninth rejected it.

In *Richardson v. Reno*, 180 F.3d 1311, 1312-13 (11th Cir. 1999) ("*Richardson II*"), *cert. denied, Richardson v. Reno*, ___, U.S. ___, 120 St. Ct. 1529 (2000), the Eleventh Circuit reaffirmed its holding in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) ("*Richardson* I"), after reconsideration in light of the Supreme Court's decision in *AADC*, that IIRIRA's permanent rules eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings. The court held that INA § 242(b)(2), § 242(e)(2) and the AEDPA's elimination of habeas review in § 401(e) evidenced Congress's intent to preclude statutory habeas review over immigration decisions. *See id.* at 1314.

More specifically, the court held that INA § 242(b)(9) and the Supreme Court's description of that section in *AADC* as a "zipper clause" that channels judicial review of immigration decisions exclusively into that provided by the INA, was evidence that Congress intended to repeal all habeas review. *See id.* at 1314-15. The court concluded that the repeal of habeas jurisdiction to review immigration decisions is not unconstitutional because judicial review still remains under INA § 242(a)(2)(C) to determine whether the petitioner is an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C). *See id.* at 1315-16. Furthermore, the court said, review of substantial constitutional questions and challenges to the constitutionality of the INA itself remains available because INA § 242(a)(2)(C) does not literally foreclose constitutional challenges to the statute itself. *See id.* at 1316 n.5.

In *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), the Fifth Circuit followed the lead of the Eleventh Circuit and agreed with the INS that 28 U.S.C. § 2241 habeas jurisdiction had been repealed by IIRIRA's permanent rules. According to the Fifth Circuit, Congress need not explicitly mention habeas jurisdiction generally or § 2241 by name to repeal habeas jurisdiction. *See id.* at 199 ("While Congress could theoretically have been more explicit by specifically mentioning habeas corpus in general or § 2241 in particular, we believe the jurisdictional limitation described throughout § 1252 was sufficiently explicit."). Accordingly, the court reasoned that, unlike the language in IIRIRA's transitional rules, the jurisdiction-stripping provisions in the permanent rules, beginning with the far more preclusive language "notwithstanding

any other provisions of law," explicitly repealed § 2241 habeas jurisdiction over immigration decisions. *Id.* at 198. The Fifth Circuit, like the Eleventh Circuit, reasoned that the repeal was not unconstitutional because sufficient judicial review remained available for criminal aliens' challenges against removal under INA § 242(a)(2)(C). *See id.* at 199-201. It did not go as far, however, as the Eleventh Circuit to hold that review of constitutional and statutory claims were preserved. It held instead that the court of appeals retains jurisdiction under § 242(a)(2)(C) only to determine whether the prerequisites for precluding review are met, whether the provisions classifying the petitioner in a specific criminal category are constitutionally applied, and whether the level of judicial review remaining in a particular case satisfies the Constitution. *See id.*

In *Liang v. INS*, 206 F.3d 308, 316-18 (3d Cir. 2000), the Third Circuit parted ways with the Fifth and Eleventh Circuits, holding that because none of the sections in § 1252 expressly refers to habeas jurisdiction or to § 2241, none expressly revoked habeas jurisdiction. The court reasoned that the Supreme Court did not, in *AADC*, decide that § 242(b)(9) radically eliminated habeas jurisdiction because that was not the issue raised in that case, and the Supreme Court explicitly noted that courts were in disagreement whether habeas jurisdiction remained after IIRIRA. *See id.* at 319. The Third Circuit also disagreed with the Fifth and Eleventh Circuits' conclusion that sufficient judicial review remained under § 242(a)(2)(C) so that the repeal of habeas was not unconstitutional, and continued to adhere to its earlier ruling in *Sandoval*, 166 F.3d 225, that the language of § 242(a)(2)(C) makes clear that the court of appeals lacks jurisdiction over

petitions of review filed by aliens removable because of prior convictions. *See id.* at 321. Because no judicial review of criminal aliens' statutory and constitutional claims remains under § 242(a)(2)(C), the court concluded that a repeal of habeas jurisdiction over immigration decisions raises serious constitutional questions. *See id.* at 321-22.

The Ninth Circuit, following the lead of the Third Circuit, held that IIRIRA's permanent rules do not use language explicit enough to repeal a federal court's habeas jurisdiction to review final removal orders. *See Flores-Miramontes v. INS*, 212 F.3d 1133, 1137-38 (9th Cir. 2000). The court reasoned that although the language of the permanent rules is stronger than that of the transitional provisions, the difference would not cause it to depart from its decision in *Magana-Pizano*, 200 F.3d 603, to find a repeal of 28 U.S.C. § 2241 jurisdiction over final removal orders. *See Flores-Miramontes*, 212 F.3d at 1137. Furthermore, the court held that § 242(b)(9) and the Supreme Court's remarks about that provision did not require the conclusion that habeas review is repealed. *See id.* at 1139. Finally, the court found that an interpretation that IIRIRA does not repeal habeas jurisdiction avoids a substantial constitutional question. *See id.* at 1141-42. In so doing, it rejected the INS's argument that review of substantial constitutional claims remained in the court of appeals under a petition for review. *See id.* at 1142.

We are persuaded by the Third and Ninth Circuits' reasoning in *Liang v. INS* and *Flores-Miramontes v. INS* that Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders. We conclude that the

scope of this review includes statutory claims such as those raised by the petitioners in this case. We do not read any exceptions into INA § 242(a)(2)(C) that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes. It is also our view that our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional questions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions.

We will not strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal. In *Felker*, 518 U.S. at 657, the Supreme Court considered whether Title I of the AEDPA, a statute limiting the right to file successive habeas petitions that specifically provided that a court of appeals's decision denying leave to file a successive petition could not be appealed or be the subject of a petition for rehearing or petition for *certiorari*, *see* 28 U.S.C. § 2244(b)(3)(E), deprived it of jurisdiction to entertain an original application for habeas relief. The Court concluded that because no provision of Title I explicitly mentioned its authority to entertain original habeas petitions, it would not find a repeal of habeas jurisdiction by implication. *See id.* at 660-61. In so holding, the Court restated its rule developed more than a century earlier in *Ex Parte Yerger*, 8 Wall. 85, 75 U.S. 85, 19 L.Ed. 332 (1868), that repeals of jurisdictional statutes by implication are not favored. *See Felker*, 518 U.S. at 660. This rule requires that a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name.

In *Jean-Baptiste*, 144 F.3d at 220, we determined that although the AEDPA and IIRIRA's transitional rules eliminated habeas corpus review under INA § 106(a)(10), neither specifically discussed 28 U.S.C. § 2241 or habeas jurisdiction generally. Following the rule articulated in *Felker*, we held that Congress did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See id.* In order to find habeas jurisdiction eradicated, our precedent thus requires an explicit statement from Congress that mentions a repeal of habeas jurisdiction. The majority of other circuit courts have also held that Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it. *See Flores-Miramontes*, 212 F.3d at 1137; *Liang*, 206 F.3d at 320; *Magana-Pizano*, 200 F.3d at 608-09; *Pak*, 196 F.3d at 673; *Bowrin*, 194 F.3d at 489; *Jurado-Gutierrez*, 190 F.3d at 1145-46; *Shah*, 184 F.3d at 724; *Goncalves*, 144 F.3d at 119; *but see LaGuerre*, 164 F.3d at 1038-39.

Nothing in IIRIRA's permanent provisions requires us to stray from our determination in *Jean-Baptiste* that habeas review survives IIRIRA. Although the language is arguably more restrictive, there is still nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241. Although each new provision works to narrow or limit the judicial review available to the criminal aliens under the INA, INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), and 242(g)[12] do not

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[12] Indeed, the INS's argument that INS § 242(g) repeals § 2241 habeas jurisdiction over final deportation orders is foreclosed by the Supreme Court's decision in *AADC*, interpreting § 242(g) to

explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241. *See* 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), (e)(2), and (g) (1999). Judicial review and habeas corpus have distinct technical meanings under the law. *See Heikkila v. Barber*, 345 U.S. 229, 235-36, 73 S. Ct. 603, 97 L.Ed. 972 (1953); *see also Flores-Miramontes*, 212 F.3d at 1140 (citing *Sandoval*, 166 F.3d at 235). We will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas.

Felker's requirement that Congress provide an explicit statement in order to repeal habeas jurisdiction is particularly relevant in this case. As the Ninth Circuit pointed out, *Felker* was decided three months before IIRIRA became law. We assume that Congress is aware of the law, *see U.S. v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990)), and therefore aware of *Felker*'s mandate when it considered the transitional and permanent rules of IIRIRA. *See Flores-Miramontes*, 212 F.3d at 1139. Had Congress intended that the avenue of review available under 28 U.S.C. § 2241 be repealed, it knew to use more explicit language than it chose.

The INS rests heavily on the phrase "notwithstanding any other provision of law" added to INA § 242(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C) (1999). However, we were not persuaded that the same exact phraseology repealed § 2241 habeas jurisdiction

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apply only to the three discrete immigration decisions identified in the section. *See* 525 U.S. at 482.

when, in *Jean-Baptiste*, we examined the effect on habeas jurisdiction of INA section 242(g). *See* 144 F.3d at 218. Other courts of appeals have also held that the "notwithstanding" language was not strong enough to repeal habeas jurisdiction. *See Sandoval*, 166 F.3d at 236; *Goncalves*, 144 F.3d at 122. Our holding and our application of it in *Jean-Baptiste* controls our interpretation of the permanent rules and requires a conclusion that the permanent rules do not divest federal courts of jurisdiction to review a criminal alien's legal challenge to his or her removal order.

As for the INS's reliance on § 242(b)(9), we first recognize that § 242(b)(9) does not expressly mention habeas jurisdiction or § 2241. INA § 242(b)(9) is a congressional limitation on judicial review and does not concern habeas jurisdiction. Thus, under *Felker* and our decision in *Jean-Baptiste*, § 242(b)(9) does not constitute a repeal of habeas corpus.

Furthermore, we are not persuaded by the INS that the Supreme Court's characterization of INA § 242(b)(9) as a "zipper clause" requires us to hold that it effects a repeal of habeas jurisdiction. In *AADC*, a group of temporary residents, who belonged to the Popular Front for the Liberation of Palestine, sought injunctive and declaratory relief on the ground that the INS was selectively enforcing the immigration laws against them in violation of their First and Fifth Amendment rights. *See* 525 U.S. at 473-74. The INS sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable to the case by § 306(c)(1) of IIRIRA, deprived the courts of power to hear the appeal. *See id.* at 475. The Supreme Court agreed with the INS that INA § 242(g) deprived

federal courts of jurisdiction over the petitioners' selective enforcement case until the deportation orders against them became final, if ever. *See id.* at 482. The Court, however, rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims" and held that the section covered only the three discrete actions delineated by the statute: the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders. *See id.*[13] In *AADC*, the Supreme Court contrasted the narrow scope of INA § 242(g) with INA § 242(b)(9), which it described as an "unmistakable zipper clause" that channels judicial review of all immigration-related decisions and actions to the court of appeals. *Id.* at 482-83.

The Court's description of INA § 242(b)(9) as a "zipper clause" that "channels judicial review" of immigration decisions to the court of appeals was not a holding that § 242(b)(9) divests federal courts of § 2241 habeas jurisdiction. The discussion of § 242(b)(9) in *AADC* pertained to whether § 242(g) was redundant of § 242(b)(9). By interpreting § 242(g) narrowly, the Supreme Court held that the apparent redundancy was a "mirage." *Id.* at 482. Far from deciding the question what habeas relief remained after IIRIRA, the Court chose not to address the question. *See id.* at 480 n.7 (noting disagreement among the courts of appeals). To repeat, that case did not concern a habeas petition but

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[13] The Supreme Court thus held that INA § 242(g) applies in a very narrow class of cases. This holding is contrary to our interpretation of that section in *Jean-Baptiste* where we assumed that it governed in the case before us. This distinction has no bearing, however, on our holding in *Jean-Baptiste* that the language of § 242(g) was insufficient to repeal § 2241.

was a case brought under a federal court's federal question subject matter jurisdiction. *See id.* at 474. Therefore, "that case does not require a conclusion contrary to the rule set forth in *Felker*." *Flores-Miramontes*, 212 F.3d at 1139. Accordingly, we will not presume that the Supreme Court meant its decision in *AADC* to have the radical effect of repealing habeas jurisdiction when it declined to address the issue directly.

As the Ninth Circuit points out, our interpretation that INA § 242(b)(9) does not eradicate 28 U.S.C. § 2241 habeas jurisdiction does not render that section meaningless. *See Flores-Miramontes*, 212 F.3d at 1140. Put differently, § 242(b)(9) forces a legal resident alien in removal proceedings to save all of his or her challenges to an unlawful government decision or action until after a final removal order is issued. Congress enacted INA § 242(b)(9) for the important purpose of consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals. *See id.* at 1141. Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition. *See* 8 U.S.C. § 1252(b)(9); *Flores-Miramontes*, 212 F.3d at 1140-41. Hence, § 242(b)(9) concerns judicial review in a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus. Finally, our interpretation of IIRIRA's permanent rules as preserving

28 U.S.C. § 2241 habeas jurisdiction allows us to avoid the serious constitutional question that a repeal of habeas jurisdiction over removal proceedings involving criminal aliens would raise under the Constitution. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) (interpreting a federal statute to avoid a serious constitutional question presented where the statute appeared to foreclose review of constitutional claims); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L.Ed. 688 (1936) (Brandeis *J.*, concurring) (same). The Suspension Clause mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require." U.S. Const. art. 1, § 9, cl. 2. Just recently, Justice Stevens, writing for the Supreme Court majority, remarked that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, — U.S. ——, 120 S. Ct. 1595, 1603, 146 L.Ed.2d 542 (2000). Historically, legal permanent residents ordered removable from this country have been entitled to assert their legal rights in habeas corpus proceedings. *See e.g., Heikkila*, 345 U.S. at 230; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S. Ct. 336, 35 L.Ed. 1146 (1892); *United States v. Jung Ah Lung*, 124 U.S. 621, 622-23, 8 S. Ct. 663, 31 L.Ed. 591 (1888). Indeed, non-citizens have long been permitted to raise statutory claims, similar to those raised by the petitioners before us, that are based on the executive branch's misinterpretation of the immigration laws. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-600, 73 S. Ct. 472, 97 L.Ed. 576 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-53, 70 S. Ct. 445, 94 L.Ed. 616 (1950); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9, 68 S. Ct. 374, 92 L.Ed. 433 (1948); *Delgadillo v. Carmichael*, 332

U.S. 388, 390-91, 68 S. Ct. 10, 92 L.Ed. 17 (1947); *Kessler v. Strecker*, 307 U.S. 22, 28-32, 59 S. Ct. 694, 83 L.Ed. 1082 (1939); *Mahler v. Eby*, 264 U.S. 32, 45, 44 S. Ct. 283, 68 L.Ed. 549 (1924). An interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution.

The INS argues that a constitutional question does not arise if 28 U.S.C. § 2241 jurisdiction is repealed because the constitutionally-mandated amount of judicial review remains under the INA. Specifically, although it acknowledges the broad preclusive language of § 242(a)(2)(C) and the majority of courts' interpretation of it, *see supra* at II. A, the INS assures us that a criminal alien may still obtain review of his or her removal orders pursuant to a petition for review in a court of appeals. It argues that this review includes all that is required by the Constitution—"substantial" constitutional claims and "certain jurisdictional facts" including whether the petitioner is an alien who is removable by reason of having committed a specified criminal offense.

It is true that the Supreme Court has held that Congress may divest the district courts of habeas jurisdiction without violating the Constitution so long as it substitutes "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977). In accord with this principle, we heretofore have recognized the need for adequate judicial review of the legal challenges filed by

a criminal alien. We have determined that, because § 242(a)(2)(C) eradicated all review for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims remains. *See Henderson*, 157 F.3d at 119; *Jean Baptiste*, 144 F.3d at 219; *Hincapie-Nieto*, 92 F.3d at 31.

The INS's interpretation of INA § 242(a)(2)(C) and its definition of what review is required by the Constitution is a misapprehension of the law, in conflict with our prior decisions, and difficult to reconcile with the INS's earlier position taken in *Hincapie-Nieto*. Although a federal court of appeals generally retains jurisdiction under INS § 242(a)(1) to review a legal resident alien's challenge to his or her final order of removal, INA § 242(a)(2)(C) excepts this review for a petition filed by a detained alien ordered removable because of a criminal conviction. *See* 8 U.S.C. § 1252(a)(2)(C). Thus, in *Hincapie-Nieto* and *Jean-Baptiste*, we interpreted § 242(a)(2)(C) as barring all review of a final order of removal entered against an alien removable because of a prior conviction. *Hincapie-Nieto*, 92 F.3d at 30; *Jean-Baptiste*, 144 F.3d at 219. Indeed, in *Hincapie-Nieto*, the INS, contrary to what it asserts here, assured the court that there was no constitutional infirmity with this interpretation because a non-citizen in executive detention could obtain judicial review of his or her deportation order by habeas corpus. *See* 92 F.3d at 31.

Furthermore, in *Jean-Baptiste*, we rejected the very same argument presented by the INS in this case. There, the INS argued that it was unnecessary to preserve habeas jurisdiction to avoid a constitutional question because review of constitutional questions re-

mained available under the INA. Relying on our prior decision in *Hincapie-Nieto*, we held that the INA as amended by IIRIRA takes away that review for legal residents ordered removable because of prior convictions. *See Jean-Baptiste*, 144 F.3d at 219-20. The INS's arguments were "not well-taken" in that case, *see id.* at 220, and are received with the same skepticism here. There is nothing in IIRIRA's permanent rules or their legislative history that indicates that Congress excepted review of substantial constitutional questions under INA § 242.

In addition, the INS's formulation of the review required by the Constitution falls short of the review that we held in *Henderson* is mandated. We found there that even a partial repeal of habeas jurisdiction to hear an executively detained alien's statutory challenges may violate the Suspension Clause. *See* 157 F.3d at 120. In that case, we reasoned that the INS's articulation of the review that is required under the Constitution:

> is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition.

Id. (*quoting Goncalves*, 144 F.3d at 118 n.8). The case of a legal permanent resident alien, in contrast, arises in the setting of executive detention, "a context in which the petitioner[ ] ha[s] never had [his or her] claim[ ] review[ed] by any court, federal or state." *Id.* In this

context, circuit courts, including this one, have noted that review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law. *See Henderson*, 157 F.3d at 121 (*citing Gegiow v. Uhl*, 239 U.S. 3, 3, 36 S.Ct. 2, 60 L.Ed. 114 (1915); *Brownell v. We Shung*, 352 U.S. 180, 182 n.1, 77 S. Ct. 252, 1 L.Ed.2d 225 (1956)); *Goncalves*, 144 F.3d at 124 (citing numerous immigration cases that have considered claims of statutory right)); *see also Mayers*, 175 F.3d at 1300 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957)); *Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954)).

Furthermore, the language of 28 U.S.C. § 2241 does not contemplate that the writ only extends to a person in custody in violation of the Constitution. Rather, the statute also provides habeas jurisdiction over claims that a person is in custody in violation of federal laws and treaties. *See* 28 U.S.C. § 2241 (providing that the writ of habeas corpus shall extend to a person in custody "in violation of the Constitution or laws or treaties of the United States"). Hence, the literal terms of 28 U.S.C. § 2241 contemplate statutory claims against executive detention.

The substitution of judicial review only of substantial constitutional questions for the habeas review guaranteed under 28 U.S.C. § 2241 therefore does not cure the constitutional infirmity that could result from a repeal of the habeas statute. Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed

a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional questions that would arise if we concluded that all judicial review had been eradicated.

Although not all challenges that an alien may launch against his removal are cognizable under habeas, purely legal statutory and constitutional claims are within § 2241's scope. Thus, a federal court's habeas review includes the claim raised by the petitioners in these consolidated cases—that IIRIRA does not apply to bar the availability of § 212(c) relief for convictions that occurred prior to its enactment. The petitioners challenge the government's refusal to consider an application for a waiver from deportation and do not ask the court to determine whether the BIA exercised its discretion appropriately. Their claim is a purely legal question that is cognizable under the habeas statute.

We note, as did the Third Circuit in *Liang*, that if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review. This would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review. However, we disagree with the Eleventh Circuit's interpretation of INA § 242(a)(2)(C) in *Richardson II* as permitting review of both statutory and constitutional claims. Although this interpretation may represent

sound legislative policy, we reiterate that we do not read IIRIRA or our prior cases to permit such review under INA § 242(a)(2)(C).

Notwithstanding, the question raised by the petitioners is a purely legal matter appropriate for a court, rather than the BIA, to determine. *See Mayers*, 175 F.3d at 1300; *see also Goncalves*, 144 F.3d at 113; *LaGuerre*, 164 F.3d at 1041. It is the type of question that, once answered by the highest court, is answered for all cases that follow presenting the same issue. We therefore believe our decision today that a legal resident alien's pure legal challenges are preserved via habeas corpus to his or her removal order serves to advance Congress's goal of streamlining judicial review.

III. CONCLUSION

We affirm our adherence to the proposition that had Congress intended to strip federal courts of habeas jurisdiction under 28 U.S.C. § 2241 over criminal aliens' statutory and constitutional challenges, it would have done so by making its intent explicit. Because the permanent rules do not mention a repeal of 28 U.S.C. § 2241 or habeas jurisdiction generally, we hold that they do not deprive a federal court of its habeas jurisdiction under § 2241 to review the purely legal claims of criminal aliens against final orders of removal. Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Calcano-Martinez, Madrid, and Khan challenging their final orders of removal, we dismiss the petitions without prejudice to Khan's pending petition or to the same claims being brought by Calcano-Martinez and Madrid under habeas corpus.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Nos. 3:99cv260 (AHN), 3:99cv772 (AHN),
3:99cv773(AHN)

ROHAN P. DUNBAR

v.

INS

GYNO DOMOND

v.

INS

ENRICO ST. CYR

v.

INS

[Aug. 30, 1999]

RULING ON PETITIONS FOR HABEAS CORPUS

The petitioners in these cases, Rohan P. Dunbar ("Dunbar"), Gyno Domond ("Domond"), and Enrico St. Cyr ("St. Cyr"), are Lawful Permanent Residents ("LPRs") of the United States currently facing deportation as a consequence of criminal acts they have committed. The Immigration and Naturalization Service ("INS") has agreed, through an oral stipulation entered into via the United States Attorney's Office for the District of Connecticut, to suspend the deportation of the petitioners pending the outcome of these actions.

In particular, the petitioners seek writs of habeas corpus compelling the INS to allow them to apply for a statutorily repealed form of discretionary relief from deportation. For the following reasons, Dunbar's petition [doc. # 1 (3:99cv260(AHN))] is GRANTED, Domond's petition [doc. # 1 (3:99cv772(AHN))] is GRANTED, and St. Cyr's petition [doc. # 1 (3:99cv773 (AHN))] is GRANTED.

BACKGROUND

On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") (effective date April 24, 1996). Later that year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) ("IIRIRA") (transitional rules effective date October 30, 1996 and permanent rules effective date April 1, 1997). As discussed below, these acts established significant

changes in the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1537 ("INA"), that affect, *inter alia*, (1) the jurisdiction of federal courts to review immigration decisions and (2) the relief available to aliens involved in deportation proceedings. The effects of these acts underlie the current petitions.

I. *Dunbar*

Dunbar was admitted to the United States as an LPR on March 27, 1984. Subsequently, he was convicted of assault in the second degree on January 2, 1996. As a consequence, on March 22, 1996, INS issued an Order to Show Cause which was served on Dunbar on April 18, 1996, but not filed with the Office of the Immigration Judge until May 1, 1996. An Immigration Judge ("IJ") held hearings on November 19, 1996, May 20, 1997, September 23, 1997, and January 12, 1998, and determined that Dunbar was subject to deportation as an alien who had committed an aggravated felony. Dunbar appealed to the Board of Immigration Appeals ("BIA") which dismissed his appeal on January 20, 1999. He filed the current petition for a writ of habeas corpus on February 11, 1999.

II. *Domond*

Domond entered the United States at an unknown time in the past. He obtained LPR status on August 12, 1993. Subsequently, on November 8, 1996, he was convicted of robbery. The robbery itself had occurred on November 18, 1994. As a result of his conviction, INS issued an Order to Show Cause on December 30, 1996, which was served on Domond on February 24, 1997, and filed with the Office of the Immigration Judge

on February 27, 1997. On March 8, 1998, an IJ determined that Domond was subject to deportation as an alien who had been convicted of an aggravated felony. Domond appealed to the BIA which dismissed his appeal on December 22, 1998. He then filed the current petition for a writ of habeas corpus on April 27, 1999.

III. *St. Cyr*

St. Cyr was admitted to the United States as a LPR on June 17, 1986. He was convicted of sale of a narcotic/hallucinogen on March 8, 1996. As a consequence, INS issued a Notice to Appear in removal proceedings on April 10, 1997, which was served on St. Cyr on July 10, 1997 and filed with the Immigration Judge on July 23, 1997. On January 12, 1998, an IJ determined that St. Cyr was subject to deportation as an alien convicted of sale of a narcotic/hallucinogen. St. Cyr appealed to the BIA which dismissed his appeal on November 10, 1998. He filed the current petition for a writ of habeas corpus on April 27, 1999.

DISCUSSION

The INA provides that any alien who has been convicted of one of several various offenses, such as an aggravated felony or a controlled substance violation, is subject to deportation. *See* 8 U.S.C.A. §§ 1227(a)(2)(A)(E) (West 1999). Prior to the 1996 amendments to the INA, an alien who faced deportation due to a criminal conviction could request discretionary relief from deportation pursuant to INA § 212(c). *See* 8 U.S.C.A. § 1182(c) (West 1995) (repealed). If that request was denied, an alien could seek review in the Courts of Appeals, *see* 8 U.S.C.A.

§ 1105(a) (West 1995) (repealed), or could petition for a writ of habeas corpus pursuant to either the INA, *see* 8 U.S.C.A. § 1105a(a) (10) (West 1995) (repealed), or the general habeas statute, *see* 28 U.S.C. § 2241 (1999).

On April 24, 1996, Congress enacted AEDPA. AEDPA § 440(d) barred INA § 212(c) relief for persons subject to deportation due to having committed any of certain enumerated criminal offenses, including aggravated felonies, and crimes involving "moral turpitude" or controlled substances. *See* AEDPA § 440(d). Later, in September 1996, Congress passed IIRIRA which repealed INA § 212(c) relief entirely and replaced it with a new type of relief designated "cancellation of removal." *See* IIRIRA § 304(b); *see also* 8 U.S.C. § 1229(b).[1] Cancellation of removal relief cannot be given to any alien that has been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3). Included in the definition of an aggravated felony is "illicit trafficking in a controlled substance." 8 U.S.C.A. § 1101(a)(43)(B).

In addition, IIRIRA supplanted the INA's judicial review provisions. *See* IIRIRA § 309(c)(1); *see also* 8 U.S.C. § 1252. In particular, the amended § 1252

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[1] IIRIRA contains two different sets of rules. First, there are the "transitional rules" which apply to persons whose removal proceedings were commenced before April 1, 1997, and against whom a final deportation order issued after October 30, 1996. *See* IIRIRA §§ 309(c), as amended by the Act of October 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657. Second, there are the "permanent rules" which apply to persons whose removal proceedings commenced after April 1, 1997. *See id.* Given this Court's conclusions, discussed *infra*, regarding the pending petitions, this distinction is not relevant for current purposes.

generally limits the availability of judicial review of deportation orders to the Courts of Appeals. *See* 8 U.S.C. §§ 1252(a)-(b). As relevant to the arguments presented in this case, § 1252(g) provides that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this act.

8 U.S.C.A. § 1252(g).

Here, the government asserts that the 1996 amendments to the INA deprive this Court of jurisdiction over St. Cyr's claim and preclude Dunbar and Domond from requesting INA § 212(c) relief.

I. *Jurisdiction*

The government contends that this Court lacks jurisdiction over St. Cyr's action because his proceedings before an IJ began after IIRIRA amended § 1252 to place severe limitations on judicial review of removal orders. In support of this claim, the government relies on *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 941-42 & 942 n.7, 142 L.Ed.2d 940 (1999) ("*AAADC* "), and *Fontes* v. *Reno*, No. 99cv10491-REK, slip op. at 8-9, (D. Mass. Mar. 9, 1999).

In *AAADC*, the Supreme Court held that § 1252(g) deprived federal courts of jurisdiction over an action that alleged that the INS had targeted certain

individuals for deportation because of their affiliation with a politically unpopular group. *See* 119 S. Ct. at 943. The Court ruled that § 1252(g) narrowly applies to preclude judicial review of the Attorney General's "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *See id.* The Court noted that many other actions exist that are part of the deportation process that are not covered by § 1252(g), and that § 1252(g) should not be read as an all-encompassing provision. *See id.* Indeed, the Court recognized that the reason this provision focuses on these discrete acts of the Attorney General is that they all represent points in a deportation proceeding at which the Attorney General could decide for humanitarian reasons to "defer action," *i.e.*, to abandon deportation proceedings against an individual who is subject to deportation. *See id.* at 943-44. This provision, then, is designed merely to shelter the Attorney General's decision to continue or discontinue a deportation proceeding, *see id.* at 944, and has no direct relevance to questions regarding a federal court's habeas jurisdiction. Indeed, in regard to the continuing validity of habeas jurisdiction, while the Supreme Court in *AAADC* expressly noted that "disagreement" exists between the Courts of Appeals concerning that issue, *see id.* at 942 n.7, it never purported to resolve that disagreement.

In pre-*AAADC* rulings, both the Second Circuit and other Courts of Appeals have held that federal courts continue even after the 1996 amendments to the INA to have jurisdiction over petitions for habeas corpus pursuant to 28 U.S.C. § 2241. *See Henderson* v. *INS*, 157 F.3d 106, 118-20 (2d Cir. 1998), *cert. denied sub nom. Navas* v. *Reno*, 526 U.S. 1004, 119 S. Ct. 1141, 143

L.Ed.2d 209 (1999); *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 219 (2d Cir. 1998), *reh'g en banc denied*, 175 F.3d 226 (1999); *see also Goncalves* v. *Reno*, 144 F.3d 110, 123 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999); *Sandoval* v. *INS*, 166 F.3d 225 (3rd Cir. 1999).

In *Jean-Baptiste*, the Second Circuit held that "in the absence of language affirmatively and clearly eliminating habeas review, we presume Congress did not aim to bar federal courts' habeas jurisdiction pursuant to § 2241." 114 F.3d at 219. In particular, the court ruled that:

> Nothing in the language of either the Antiterrorism Act or the Immigration Reform Act suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241, and repeal by implication of the rights to petition for habeas corpus relief is disfavored.

See id. (citing, *inter alia*, *Felker* v. *Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996)).

In *Henderson*, the Second Circuit reaffirmed that § 2241 habeas remains a valid option after the 1996 amendments although the scope of review permitted has been narrowed. *See* 157 F.3d at 119. In particular, the court stated that federal courts retain the "power to review the Attorney General's interpretation of the immigration laws." *Id.* at 120 & nn. 10-12. Similarly, the First and Third Circuits have held that the 1996

INA amendments neither expressly nor implicitly repealed the ability of a petitioner to seek judicial review by a writ of habeas corpus pursuant to § 2241. *See Goncalves*, 144 F.3d at 119-23 (discussing several grounds for holding § 2241 not repealed); *Sandoval*, 166 F.3d at 238.

Here, the Court holds that it retains habeas jurisdiction over all of the petitioners' claims. Following *Jean-Baptiste*, the Court concludes that Congress has not explicitly repealed or limited § 2241 habeas jurisdiction. *See* 144 F.3d at 219. Further, the basic issue of retrospective application of the 1996 amendment and eventual repeal of § 212(c) relief is the same variety of issue over which the *Henderson* court concluded federal courts retain habeas jurisdiction. Finally, as discussed above, the Supreme Court's ruling in *AAADC* is inapposite, as it merely clarifies that § 1252(g) primarily applies to "deferred action" decisions by the Attorney General and does not address the status of habeas jurisdiction after the 1996 amendments.[2]

II. *Availability of INA § 212(c) Relief*

The government argues that the petitioners should not be entitled to INA § 212(c) relief because their deportation proceedings commenced after the effective date of AEDPA, *i.e.*, April 24, 1996. In particular, the government contends that application to the petitioners of AEDPA § 440(d)—which significantly limited the cases where section 212(c) relief could be sought—does

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[2] Based on this Court's interpretation of *AAADC* and relevant Second Circuit precedent, this Court finds the reasoning of *Fontes*, No. 99cv10491-REK, slip op. at 8-9, to be unpersuasive.

not constitute an unjustified retrospective application of § 440(d).

The Second Circuit has held in general "that § 440(d) does not apply to cases initiated before the date of its enactment." *Henderson*, 157 F.3d at 129 (expressing agreement with the First Circuit's opinion in *Goncalves*, 144 F.3d at 126). In support of this conclusion, the *Henderson* court recognized that "statutes are not ordinarily afforded retroactive effect unless 'Congress has clearly manifested its intent' to have them so applied." *Id.* (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1876, 138 L.Ed.2d 135 (1997)). However, the court found that it did not have to rely on that presumption because "when § 440(d) is read in conjunction with the rest of the AEDPA and with the legislative history of the statute, there is abundant direct evidence that the section was not intended to apply retroactively." *Id.* at 129-30 (discussing that other AEDPA sections contain explicit language of their retrospective effect and that compromise bill passed by Congress omitted Senate language that would have applied § 440(d) retroactively).

Based upon this determination, the Second Circuit held that when a petitioner's "deportation proceeding was pending on the date of the statute's enactment, . . . § 440(d) does not apply to him." *Id.* at 130 (footnote omitted). In particular, the court found that § 440(d) did not apply to a petitioner who requested INA § 212(c) relief prior to AEDPA's enactment even though the deportation hearing was held after AEDPA's enactment. *See id.* at 110, 130. The court also ruled that § 440(d) did not apply to a petitioner who

was in exclusion proceedings prior to AEDPA's enactment, which were changed to deportation proceedings after the enactment. *See id.* at 111, 130. However, due to its reading of the facts of the petitions in *Henderson*, the Second Circuit expressly stated that it "need not reach [petitioner's] broader argument that the statute should not apply to primary conduct—*i.e.*, criminal convictions—that occurred prior to April 24, 1996." *Id.* at 128 n.28.

With this background in mind, the Court now turns to the arguments advanced in these cases. Preliminarily, the government argues that this Court should not recognize a deportation proceeding as commencing until after the Order to Show Cause has been filed with the IJ. In support, the government points out that under 8 C.F.R. § 242.1(a) deportation proceedings begin when the Order is filed with the IJ. The government contends that when the Order was issued is irrelevant to whether deportation proceedings have commenced.

The Court is not convinced. This Court agrees with the District of Oregon that:

> the defendants' argument that [petitioner] was not in deportation proceedings until the order to show cause was filed with the immigration court [is unpersuasive]. As of the time the order to show cause was issued, the INS had the power to arrest him; commencement of the case in immigration court was subject only to the vagaries of administrative scheduling. From a due process standpoint, [petitioner] was subject to the deportation power of the INS as of the time the show cause order issued; fairness requires that the INS, having placed [peti-

> tioner] under its authority, should also live with the results of that decision.

Mercado-Amador v. *Reno*, 47 F. Supp. 2d 1219, 1223-1224 (D. Or. 1999) (reaffirming ruling that § 440(d) did not apply to petitioner where INS issued order to show cause prior to AEDPA's enactment but did not serve order on petitioner until after AEDPA's enactment).

Given this Court's determination that a deportation proceeding effectively begins once an Order to Show Cause has been issued to a potential deportee, *Henderson* indicates that potential deportees who have been issued Orders to Show Cause prior to the enactment of AEDPA should be allowed to request INA § 212(c) relief. *See Henderson*, 157 F.3d at 111, 130 n.30 (finding petitioner whose case changed from exclusion to deportation after April 24, 1996 and who did not request section 212(c) relief until August 2, 1996 should be provided a hearing on such relief). Here, this reasoning requires that Dunbar's petition be granted. However, as discussed below, this Court finds that alternate grounds also compel this result.

As the primary argument in these cases, the petitioners claim exactly what the Second Circuit declined to address in *Henderson*—that § 440(d) should not apply to persons whose convictions (or in Domond's case, criminal conduct only) occurred prior to April 24, 1996. The basic issue, then, is one of "retrospective application."

The Supreme Court, in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229

(1994), set forth the basic framework for addressing whether a statute applies retrospectively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280, 114 S. Ct. 1483. The Court stated that in making this determination:

> [a] court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," *see Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, 59 N.E.

> 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. at 269-70, 114 S.Ct. 1483.

Here, the Court holds that these principles dictate that the current petitioners should have their deportation proceedings governed by the laws that were in effect at the time they committed their crimes. *See Pottinger* v. *Reno*, 51 F. Supp. 2d 349, 351 (E.D.N.Y. 1999) (stating "petitioners in all these cases should be treated as if the laws governing their rights were those in existence at the time they committed the crimes for which the government now seeks to deport them"). Alternatively, the Court believes that at the very least the date of conviction should control the determination of when a person is in deportation proceedings. *See Wallace* v. *Reno*, 24 F. Supp. 2d 104, 111-12 (D. Mass. 1998) (holding that § 440(d) does not apply to individuals whose deportation proceedings resulted from guilty pleas entered into prior to April 24, 1996). The reasons for these conclusions are set forth below.

As an initial matter, the Court finds that the type of discretionary relief the petitioners seek constitutes a legal interest that is important enough for retrospective application concerns to apply. *See Lee* v. *Reno*, 15 F. Supp. 2d 26, 45-46 (D.D.C. 1998) (stating that "even though [petitioner] never had a 'right' to receive a § 212(c) waiver, he certainly was entitled to have the opportunity to be heard and to present his case in accordance with the agency's factors" and that "at the time of [petitioner's] conduct, he could have applied for a § 212(c) wavier, and retroactive application of § 440(d)

would 'disable' him from doing so"); *see also AAADC*, 119 S. Ct. at 950 (Ginsburg, J., concurring) (recognizing that "[d]eportation . . . is a grave sanction"); *Pottinger*, 51 F. Supp. 2d at 362 ("A 'legal change that would have an impact on private parties' planning' triggers the presumption against retroactivity, even if the change is only the attachment of additional civil liability to conduct that was already deemed 'morally reprehensible or illegal'" (quoting *Landgraf*, 511 U.S. at 282-83 & n.35, 114 S. Ct. 1483)).

Here, the Court finds that the operative event for determining whether AEDPA § 440(d) and the IIRIRA amendments should apply is the actual commission of the crime for which the petitioners now face deportation. *See Pottinger*, 51 F. Supp. 2d at 355. "The time of the conviction and the time deportation proceedings commenced were happenstance, without relevance to the reason for congressional treatment of criminal permanent resident aliens." *Id.* Indeed, the very purpose of the amendments was to change the legal consequences of certain criminal conduct, not the consequences of being convicted of that conduct or having deportation proceedings commenced.

As recognized by the Second Circuit in *Henderson* and expounded upon by the Eastern District of New York in *Pottinger*, AEDPA contains several provisions that provide varying degrees of retroactivity for their application. *See Pottinger*, 51 F. Supp. 2d at 359 (reviewing how "AEDPA section 440(d)'s silence as to temporal reach stands in stark contrast to the finely calibrated retroactivity language of other AEDPA sections"). This state of affairs leaves no doubt as to the ability of Congress to delineate the temporal reach

of a statute. The failure of Congress to explicitly and clearly indicate whether the amendments limiting and ultimately repealing INA § 212(c) relief should apply to primary conduct predating the enactment of those amendments leaves no room for doubt that they the amendments should not be applied retrospectively. *Cf. id.* at 360-361 (stating "Congress's choice not to include . . . any retroactivity language—in section 440(d) is reasonably construed as evidence of its plan to designate the section as applicable only to post-enactment conduct").

As noted in *Pottinger*, this conclusion is bolstered by the Supreme Court's recognition that statutes are generally presumed not to apply retrospectively:

> The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

Id. (quoting *Landgraf*, 511 U.S. at 265, 114 S. Ct. 1483). In addition, this Court concurs with the view that "the rule of lenity complements *Landgraf* in requiring the statute to be read in favor of the petitioner." *Id.* at 363.

Here, this determination requires that all of the current petitions be granted because all of the petitioners

committed the crimes which provide the basis for their deportation proceedings prior to April 24, 1996.

In the event of an appeal and rejection of the primary holding in this case, the Court notes its belief that at a minimum the date of conviction should govern a potential deportee's eligibility for INA § 212(c) relief. *See Wallace*, 24 F. Supp. 2d at 111-12; *see also Pottinger*, 51 F. Supp. 2d at 360-61. As recognized in *Wallace*, attorneys have a professional duty to discuss the immigration consequences of a conviction with their noncitizen clients and a large percentage of INA § 212(c) requests for relief have been granted. *See Wallace*, 24 F. Supp. 2d at 110-11 (noting, in regard to guilty pleas, that "a noncitizen criminal defendant would most likely have been informed of and had good reason to consider the immigration consequences of a guilty plea"). These considerations indicate that potential deportees would have had settled expectations and reasonably relied on their eligibility for INA § 212(c) relief at the time of their guilty pleas or convictions. Under these circumstances, the Court concludes that the *Landgraf* principles counsel that the amendments to AEDPA and IIRIRA at issue should not apply retroactively to bar petitioners whose convictions predate those amendments from requesting INA § 212(c) relief.[3]

A brief concluding remark is appropriate. These consolidated cases represent yet another example of the costly and unnecessary litigation that is spawned by Congress when it fails to indicate whether legislation

---

[3] The Court notes that if the operative date is found on appeal to be the date of guilty plea or conviction, then all of the petitioners except Domond will still be eligible to request INA § 212(c) relief.

should be applied retrospectively. A one line sentence could have avoided these and many other cases currently pending before the courts of this Circuit and its sister Circuits.

CONCLUSION

For the reasons stated above, Dunbar's petition [doc. # 1 (3:99cv260(AHN))] is GRANTED, Domond's petition [doc. # 1 (3:99cv772(AHN))] is GRANTED, and St. Cyr's petition [doc. # 1 (3:99cv773(AHN))] is GRANTED. The Clerk is ordered to CLOSE these cases.

SO ORDERED this 23rd day of August, 1999 at Bridgeport, Connecticut.

/s/ ALAN H. NEVAS
ALAN H. NEVAS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

3:99CV773AHN

ENRICO ST. CYR

v.

IMMIGRATION AND
NATURALIZATION SERVICE

[Filed Aug. 30, 1999]

JUDGMENT

This cause came on for consideration on a petition for habeas corpus by the Honorable Alan H. Nevas, Senior U.S. District Judge, and

The Court having considered the petition and all the papers submitted in connection therewith, filed its Ruling on Petition for Habeas Corpus granting the petition and allowing the petitioners to apply for a statutorily repealed form of discretionary relief from deportation.

It is therefore ORDERED and ADJUDGED that the writ of habeas corpus is granted and Immigration and Naturalization is to allow petitioners to apply for discretionary relief from deportation pursuant to the Court's ruling.

Dated at Bridgeport, Connecticut, this 30th day of August, 1999.

KEVIN F. ROWE, CLERK

By Signature illegible
Deputy Clerk

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A41 052 179 – Hartford Date: Nov 10 1998

In re: ENRICO SAINT CYR a.k.a. Enrico St. Cyr

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Michael G. Moore, Esquire
[REDACTED]
[REDACTED]

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Waiver of Inadmissibility; cancellation of removal

ORDER:

PER CURIAM. The respondent's appeal fee waiver request is granted. See 8 C.F. R. § 3.8(c). The appeal is dismissed. The respondent is a native and citizen of Haiti, and a United States lawful permanent resident.

The record reflects that in 1996, he was convicted of sale of a hallucinogen/narcotic in the State of Connecticut (Exh. 2). Based on this evidence, the Immigration Judge found the respondent removable as charged. The respondent requested a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), which the Immigration Judge denied.

On appeal, the respondent argues that he is eligible for a section 212(c) waiver of inadmissibility. We disagree as section 212(c) relief is not available in removal proceedings, which the respondent is properly in. Section 212(c) was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996), and was replaced with cancellation of removal under section 240A, 8 U.S.C. § 1229b. The respondent is statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony. See sections 101(a)(43)(B), 8 U.S.C. §§1101(a)(43)(B), and 240A(a)(3). Accordingly, the appeal is dismissed.

/s/ JOHN GUENDELSBERGER
JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:	Case No. A 41 052 179
ENRICO ST. CYR	Docket: MACDOUGUAL
RESPONDENT	REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1-12-98. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☒ The respondent was ordered deported to HAITI.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

☐ Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to_____ or _____.

☐ Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☒ Respondent's application for waiver under Section 212(c) of the Immigration and Nationality Act was ( ) granted (X) denied ( ) withdrawn ( ) other.

☐ Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Proceedings were terminated.

☐ The application for adjustment of status under Section (216)(216A)(245)(249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

☐ Respondent's status was rescinded under Section 246.

☒ Other 2-11-98 _____.

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Signature illegible
Immigration Judge

Date: 1-12-98

Appeal: RESERVED/WAIVED (A/I/B)

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall

---

[1] Section 1182(c) of Title 8 was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. The version set forth in the text reflects both sets of amendments.

limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 235(b) of the Immigration and Nationality Act, 8 U.S.C. 1225(b) (Supp. IV 1998), provides in pertinent part:

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

* * * * *

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and ques-

tioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

* * * * *

7. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. 1229b(a) (Supp. IV 1998), provides:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel the removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (a) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (b) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (c) has not been convicted of any aggravated felony.

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. IV 1998), provides in pertinent part:

> **§ 1252. Judicial review of orders of removal**
>
> **(a) Applicable provisions**
>
> **(1) General orders of removal**
>
> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not

order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

* * * * *

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this

subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such

further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

* * * * *

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

---

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA.

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

> **EFFECTIVE DATES; TRANSITION.**
>
> (a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").
>
> * * * * *
>
> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
>
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

* * * * *

13. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]
>
> * * * * *

Supreme Court, U.S.
FILED
DEC 21 2000
OFFICE OF THE CLERK

(3)

No. 00-767

In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent is a longtime legal permanent resident who is subject to a final order of removal. The Board of Immigration Appeals ruled that he is statutorily barred from applying for discretionary relief under former 8 U.S.C. 1182(c) (1994) in light of 1996 amendments to the Immigration and Nationality Act. Respondent sought review of the Board's legal ruling in a habeas corpus action under 28 U.S.C. 2241. The court of appeals, under the authority of a simultaneously-issued companion case, *Calcano-Martinez v. INS*, held that the district court properly exercised habeas corpus jurisdiction. On the merits, the court of appeals held that the Board erred as a matter of law and that respondent is eligible to apply for a Section 1182(c) waiver. The questions presented are:

1. Whether the district court had habeas corpus jurisdiction over respondent's statutory retroactivity and constitutional due process challenge to his final order of removal.

2. Whether aliens in removal proceedings may be eligible to apply for relief under former 8 U.S.C. 1182(c) if they pled guilty before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Statutes or Other Provisions Involved 1

Statement 2

The Statutory Framework 3

1. Relief from Deportation 3

2. Judicial Review 7

Statement of Facts 10

Reasons for Denying the Writ 14

1. Jurisdiction 14

2. Retroactivity 20

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES:

Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000) 16

Bowrin v. INS, 194 F.3d 483 (4th Cir. 1999) 8

Calcano-Martinez v. INS, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000), *petition for cert. filed*, (Dec. 20, 2000) 2, 10, 12, 14, 18, 19, 27

Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....26, 27

Chow v. INS, 113 F.3d 659 (7th Cir. 1997)..... 8

Commodities Future Trading Comm'n v. Schor, 478 U.S. 833 (1986) 17

Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) 8

Felker v. Turpin, 518 U.S. 651 (1996) 8-9, 16

Finlay v. INS, 210 F.3d 556 (5th Cir. 2000)..... 16

Flores-Miramontes v. INS, 212 F.3d 1133 (9th Cir. 2000)..... 10

Galindo-Del Valle v. Attorney General, 213 F.3d 594 (11th Cir. 2000)..... 25

Garnica-Vasquez v. Reno, 210 F.3d 558 (5th Cir. 2000)..... 16

Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999)..... 4, 8, 9

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999) 4, 8, 9, 17

Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996)..... 8

TABLE OF AUTHORITIES – Continued

Page

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 20, 26

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 26

INS v. Magana-Pizano, 526 U.S. 1001 (1999) 9

Jideonwo v. INS, 224 F.3d 692 (7th Cir. 2000) ... 5, 24, 25

Jurado-Gutierrez v. Greene, 190 F.3d 1135 (10th Cir. 1999) 8

Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) 8

LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000) 5, 8, 15, 24, 25

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 12, 13, 20, 26, 27

Lerma de Garcia v. INS, 141 F.3d 215 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1258 (1998) 8

Liang v. INS, 206 F.3d 308 (3d Cir. 2000), *petition for cert. pending sub nom. Rodriguez v. INS*, No. 00-753 10

Lindh v. Murphy, 521 U.S. 320 (1997) 20

Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999) 4, 5, 8, 9

Mahadeo v. Reno, 226 F.3d 3 (1st Cir. 2000), *petition for cert. pending*, No. 00-962 10

Martin v. Hadix, 527 U.S. 343 (1999) 20

Mattis v. Reno, 212 F.3d 31 (1st Cir. 2000) 5

Max-George v. Reno, 205 F.3d 194 (5th Cir. 2000), *petition for cert. pending*, No. 00-6280 ..... 10, 15, 16

Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999) 4-5, 8

TABLE OF AUTHORITIES – Continued

Page

Morales-Ramirez v. Reno, 209 F.3d 977 (7th Cir. 2000) 25

Pak v. Reno, 196 F.3d 666 (6th Cir. 1999) 4, 8

Perez v. Reno, 227 F.3d 294 (5th Cir. 2000) 16

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) 9

Reno v. Goncalves, 526 U.S. 1004 (1999) 5, 9, 15

Reno v. Navas, 526 U.S. 1004 (1999) 5, 9, 15

Requena-Rodriguez v. Pasquarell, 190 F.3d 299 (5th Cir. 1999) 8

Richards-Diaz v. Fasano, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) 6, 10, 23, 24, 25

Richardson v. Reno, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000) 10, 15, 16

Russell v. Reno, 216 F.3d 1091 (11th Cir. 2000), *petition for cert. pending*, No. 00-5970 16

Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997) 8

Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999) 4, 8, 9

Shah v. Reno, 184 F.3d 719 (8th Cir. 1999), *reh'g denied* (1999) 4, 8, 9

Singh v. Perryman, 182 F.3d 504 (7th Cir. 1999) 18

Soriano, In re, Int. Dec. No. 3289, 1996 WL 426888 (BIA June 27, 1996) (AG Feb. 21, 1997) 4, 8

Swain v. Pressley, 430 U.S. 372 (1977) 17

Tasios v. Reno, 204 F.3d 544 (4th Cir. 2000) ... 3, 4, 5, 13

TABLE OF AUTHORITIES – Continued

Page

Turkhan v. Perryman, 188 F.3d 814 (7th Cir. 1999) 18

Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999) 4

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)..... 17

Yerger, Ex Parte, 75 U.S. (8 Wall.) 85 (1869)..... 16

DOCKETED CASES:

Domond v. INS, No. 99-2619 (2d Cir.)..... 11

Max-George v. Reno, No. 00-6280..... 15

Rodriguez v. INS, No. 00-753 10

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const.:

Art. I, § 9, cl.2 (Suspension of Habeas Corpus Clause)..... 17

Art. III 1, 17

Amend. V (Due Process Clause) 1, 17

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214..... 2

§ 401(e), 110 Stat. 1268 7

§ 440(a), 110 Stat. 1276-1277 7

§ 440(d), 110 Stat. 1277 .....4, 5, 8, 24, 25

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 Div. C, 110 Stat. 3009-546..... 2

TABLE OF AUTHORITIES – Continued

Page

§ 304(a), 110 Stat. 3009-587 ..... 4, 5

§ 304(b), 110 Stat. 3009-597 ..... 4, 6, 13

§ 309(a), 110 Stat. 3009-625 ..... 5, 6

§ 309(c)(4), 110 Stat. 3009-626 7

§ 309(c)(4)(G), 110 Stat. 3009-626 7

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1105a (1994) (repealed 1996) 7

8 U.S.C. 1105a(a)(10) (1994) (repealed 1996) 7

8 U.S.C. 1129b(a)(3) (Supp. IV 1998) 23

8 U.S.C. 1182(c) (1994) (repealed 1996) ..... *passim*

8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 11

8 U.S.C. 1229b(a) (Supp. IV 1998) 6

8 U.S.C. 1252 (Supp. IV 1998) 7, 9, 10

8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) ... 9, 12, 14, 15, 19

18 U.S.C. 3143 22

18 U.S.C. 3585 22

28 U.S.C. 2241 ..... *passim*

65 Fed. Reg. 44,478 (2000) 5

OPINIONS BELOW

Respondent adopts petitioner's statement of the opinions below. The court of appeals' opinion is now reported at 229 F.3d 406.

JURISDICTION

Respondent adopts petitioner's statement of jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the *certiorari* petition and reprinted in the petitioner's Appendix:

U.S. Const., Art. III, provides, in relevant part:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . "
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . "

U.S. Const., Amend. V provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

STATEMENT

This case concerns jurisdictional and substantive amendments to the Immigration and Nationality Act (INA) made in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, that govern the removal of longtime legal permanent resident immigrants who are deportable based on their past criminal convictions. The jurisdictional issue is whether the court of appeals correctly determined that respondent's statutory and constitutional challenge to his final order of removal may be heard in a district court habeas corpus action. The merits issue is whether AEDPA's amendment to, and IIRIRA's subsequent repeal of, 8 U.S.C. 1182(c) (1994) applies retroactively to respondent's pre-AEDPA/IIRIRA guilty plea.

There is no compelling reason to grant *certiorari* on the jurisdictional question because the disagreement among the circuit courts simply maintains a difference that this Court has previously declined to review. If, however, the Court determines that review is now warranted on the jurisdictional question, respondent respectfully submits that *certiorari* should be granted in *Calcano-Martinez v. INS*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000), *petition for cert. filed*, (Dec. 20, 2000), in lieu of – or at a minimum in addition to – this case because *Calcano-Martinez* better presents the complete jurisdictional question.

Certiorari should also be denied on the merits question because: (1) the court of appeals' ruling represents nothing more than an application of well-developed retroactivity jurisprudence that this Court has articulated and clarified in four recent decisions, (2) the court of appeals' decision applies to a closed and diminishing set of cases, and (3) the specific retroactivity issue presented here was correctly decided and has been squarely addressed by only two circuits, which agree on the applicable retroactivity test and disagree only marginally on the application of that test to the facts of a particular subset of cases.

THE STATUTORY FRAMEWORK

Respondent generally agrees with the petitioner's description of the statutory framework and makes only the following points.

1. *Relief from Deportation.* Legal permanent residents who become deportable based on criminal convictions have long been entitled to apply for discretionary relief if they meet the statutory eligibility criteria. *See* 8 U.S.C. 1182(c) (1994) (requiring that the immigrant must be a legal permanent resident, must have seven consecutive years of residency, and must not have served five years or more for an "aggravated felony"). In the years preceding the amendments at issue here, over half of the total number of applications for Section 1182(c) relief were granted. *See* Pet. App. 28a; *Tasios v. Reno*, 204 F.3d 544, 551 (4th Cir. 2000) (relying on U.S. Department of Justice statistics).

In 1996, Congress twice legislated with regard to Section 1182(c). In AEDPA, Congress restricted eligibility for Section 1182(c) by expanding the number of disqualifying criminal convictions, among which are various non-violent and non-aggravated offenses. *See* AEDPA 440(d). In IIRIRA, Congress repealed Section 1182(c) and replaced it with a new form of discretionary relief for immigrants who become deportable based on a criminal conviction. *See* IIRIRA 304(a), (b).

The Board of Immigration Appeals (BIA or Board) initially held that AEDPA 440(d) did not apply retroactively to Section 1182(c) applications that were pending when AEDPA was enacted. *See In re Soriano*, Int. Dec. No. 3289, 1996 WL 426888 (BIA June 27, 1996). The Attorney General overturned the BIA's decision and ruled that the AEDPA restrictions applied to *all* pending immigration cases. *See id.* (AG Feb. 21, 1997).

Eight courts of appeals reversed the Attorney General's decision, and most held that AEDPA's amendment to Section 1182(c) did not apply to cases where the immigration proceedings commenced before AEDPA's passage, even if the Section 1182(c) application had not yet been filed.[1] Only the Seventh Circuit initially agreed with

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[1] *See Goncalves v. Reno*, 144 F.3d 110, 126-33 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Wallace v. Reno*, 194 F.3d 279, 282-87 (1st Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *San .oval v. Reno*, 166 F.3d 225, 239-42 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544, 548-52 (4th Cir. 2000); *Pak v. Reno*, 196 F.3d 666, 675-76 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 724-25 (8th Cir. 1999), *reh'g denied* (1999); *Magana-Pizano v. INS*, 200 F.3d 603, 610-11 (9th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th

the Attorney General's ruling, but that circuit later retreated from its view in a significant respect.[2] This Court has declined to review the circuit court decisions governing eligibility for Section 1182(c) relief in light of AEDPA 440(d).[3] On July 18, 2000 the Attorney General published a proposed rule that would adopt the view of the majority of circuits and render AEDPA 440(d) inapplicable to immigrants whose deportation proceedings commenced before AEDPA's enactment. *See* 65 Fed. Reg. 44,478 (2000); Pet. Br. 6 n.4. The proposed rule does not address immigrants, like the respondent, who are in removal proceedings.

On April 1, 1997, the provisions of IIRIRA at issue here went into effect. *See* IIRIRA 309(a). Section 304(a) of IIRIRA combined and renamed the former deportation

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Cir. 1999). Some circuits held that Section 440(d) also did not apply to (some or all) immigrants who pled guilty to the disqualifying criminal offense before AEDPA's enactment. *See Mattis v. Reno*, 212 F.3d 31, 37 (1st Cir. 2000) (requiring showing of specific reliance); *Magana-Pizano*, 200 F.3d at 612-13 (same); *Tasios*, 204 F.3d at 550-52 (no specific reliance required); *Jideonwo v. INS*, 224 F.3d 692, 699-700 (7th Cir. 2000) (requiring specific reliance).

[2] In *LaGuerre v. Reno*, 164 F.3d 1035, 1041-44 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000), the Seventh Circuit endorsed the Attorney General's reading of the temporal reach of AEDPA 440(d). Recently, the court substantially modified that result when it held that Section 440(d) does not apply to an immigrant who pled guilty before AEDPA's enactment and relied on the possibility of Section 1182(c) relief at the time of the plea. *See Jideonwo*, 224 F.3d at 699-700.

[3] *See, e.g., Reno v. Goncalves*, 526 U.S. 1004 (1999); *Reno v. Navas*, 526 U.S. 1004 (1999); *LaGuerre v. Reno*, 120 S. Ct. 1157 (2000).

and exclusion procedures into "removal" proceedings. It also established a new form of relief, called "cancellation of removal," that is available to qualifying immigrants whose criminal conviction does not constitute an "aggravated felony" under the INA. 8 U.S.C. 1229b(a). In IIRIRA 304(b), Congress repealed Section 1182(c), effective April 1, 1997. IIRIRA 309(a).

The government contended, and the BIA held in respondent's case, that under IIRIRA an alien in removal proceedings is never eligible to apply for relief under former Section 1182(c), regardless of the circumstances. The Second Circuit's ruling in this case is the first court of appeals decision squarely to address that question. Since the filing of the government's *certiorari* petition, one other court of appeals has done so. *See Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

The Second Circuit held in this case that some immigrants in removal proceedings are eligible to apply for relief under Section 1182(c). The court of appeals ruled that Section 1182(c) remains available for those immigrants who pled guilty, before the enactment of AEDPA and IIRIRA, to the criminal offense that would now disqualify them. In *Richards-Diaz*, the Ninth Circuit agreed that immigrants who entered pre-AEDPA/IIRIRA guilty pleas may be eligible for Section 1182(c) relief in removal proceedings, but limited its holding to those immigrants who "specifically relied on the availability of a discretionary waiver" under Section 1182(c) when they entered their guilty pleas. *Id.* at *4. No other court of appeals has squarely decided the effect of IIRIRA on Section 1182(c).

2. *Judicial Review.* Both AEDPA and IIRIRA also amended the INA provisions governing judicial review. AEDPA amended 8 U.S.C. 1105a, the provision governing review of deportation (and exclusion) orders, by enacting Sections 401(e) and 440(a). Section 401(e) repealed the INA habeas corpus provision, former 8 U.S.C. 1105a(a)(10), and Section 440(a) restricted "review by any court" of orders issued against aliens who were deportable on enumerated criminal grounds. IIRIRA then enacted two additional sets of jurisdictional changes. The first further amended the procedures applicable to pending deportation and exclusion orders by adopting special uncodified "transitional" rules to modify the requirements of 8 U.S.C. 1105a.[4] The second set – and the one at issue here – enacted a new "permanent" judicial review statute, codified at 8 U.S.C. 1252, to govern all immigration "removal" proceedings initiated on or after April 1, 1997. IIRIRA repealed Section 1105a altogether for those cases.

a. For deportation cases, AEDPA and IIRIRA's transitional rules maintained the prior provisions that placed exclusive review in the court of appeals by the petition-for-review procedure. However, they also imposed restrictions on review of final orders of deportation based on certain criminal convictions. *See* AEDPA 440(a); IIRIRA 309(c)(4)(G). These provisions led to substantial litigation in the circuit courts. Immigrants subject to the

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[4] *See* IIRIRA 309(c)(4). The "transitional" provisions apply to all deportation and exclusion cases initiated before April 1, 1997, in which the administrative order becomes final on or after October 31, 1996. *Id.*

restrictions sought to preserve the circuits' petition-for-review jurisdiction. Most courts of appeals held, however, that their own jurisdiction had been repealed but that district court habeas corpus actions were not necessarily foreclosed.[5]

Immigrants then brought habeas corpus actions under 28 U.S.C. 2241 to review claims that the courts of appeals had held the circuits could not hear by means of a petition for review. In particular, immigrants brought statutory retroactivity and constitutional equal protection challenges to the Attorney General's decision (in *In re Soriano, supra*) that AEDPA 440(d) had eliminated their eligibility to apply for discretionary waivers of deportation under Section 1182(c). The circuit courts, with one exception, ultimately held that neither claim could be brought in a petition for review because of the restrictions in AEDPA and IIRIRA's transitional rules, but that both claims were judicially reviewable in a district court habeas corpus action under 28 U.S.C. 2241.[6] These holdings were based on the ruling in *Felker v. Turpin*, 518 U.S.

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[5] *See, e.g., Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27, 31 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir. 1998); *Chow v. INS*, 113 F.3d 659, 669 (7th Cir. 1997); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996).

[6] *See Goncalves*, 144 F.3d at 118-26; *Henderson*, 157 F.3d at 118-22; *Sandoval*, 166 F.3d at 229-38; *Bowrin v. INS*, 194 F.3d 483, 486-89 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak*, 196 F.3d at 670-73; *Shah*, 184 F.3d at 722-24; *Magana-Pizano*, 200 F.3d at 607-09; *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1142-47 (10th Cir. 1999); *Mayers*, 175 F.3d at 1295-1300. *But see LaGuerre*, 164 F.3d at 1040-41.

651, 660 (1996), that habeas corpus cannot be repealed by implication, as well as the courts of appeals' concern for the "profound" and "serious" constitutional questions that would be presented if review were wholly precluded.[7] The courts thus held that Section 2241 remained available for (at least) statutory retroactivity and constitutional challenges regarding eligibility for discretionary relief. This Court declined to review those decisions.[8]

b. The same jurisdictional question has now arisen under the IIRIRA *permanent* judicial review provisions, codified at 8 U.S.C. 1252 *et seq.*, that govern final orders of removal. Section 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal" based on an enumerated ground of deportation. The First, Second, Third and Ninth Circuits have held that Section 1252(a)(2)(C) repeals the circuit courts' own petition-for-review jurisdiction but that habeas corpus under 28 U.S.C. 2241 remains available to hear constitutional and statutory claims regarding statutory eligibility

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[7] *See Henderson*, 157 F.3d at 118-22. *See also Goncalves*, 144 F.3d at 122-23; *Sandoval*, 166 F.3d at 236-38; *Shah*, 184 F.3d at 724.

[8] *See, e.g., Reno v. Goncalves*, 526 U.S. 1004 (1999); *Reno v. Navas*, 526 U.S. 1004 (1999). The Court vacated and remanded *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), in light of this Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). The Ninth Circuit in *Magana-Pizano* had issued a constitutionally-based decision because an earlier circuit precedent had held that Section 2241 had been repealed. On remand, the Ninth Circuit held that Section 2241 was not repealed, basing its decision on the same statutory grounds adopted by the other courts of appeals. *See Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999).

for discretionary relief.[9] Those courts have again noted the "profound" (Pet. App. 61a) constitutional question that would be presented if all review of pure statutory or constitutional claims were precluded.[10] In contrast, as petitioner notes, the Fifth and Eleventh Circuits have issued opinions finding that Section 1252 generally repealed the district courts' habeas corpus jurisdiction under 28 U.S.C. 2241. The cases in those circuits have not resolved the types of claims that can be heard in a petition for review, and the principal decisions do not directly present a constitutional or statutory challenge to the denial of eligibility for a discretionary waiver of removal.[11]

STATEMENT OF FACTS

1. Enrico St. Cyr is a Haitian citizen who has been a legal permanent resident of the United States for 14

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[9] *See Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *petition for cert. pending*, No. 00-962; *Calcano-Martinez*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000), *petition for cert. filed*, (Dec. 20, 2000); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *petition for cert. pending sub nom. Rodriguez v. INS*, No. 00-753; *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

[10] *See also Mahadeo*, 226 F.3d at 10; *Liang*, 206 F.3d at 315, 321; *Flores-Miramontes*, 212 F.3d at 1141, 1142.

[11] *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *petition for cert. pending*, No. 00-6280 (challenging whether alien was deportable); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000) (challenging detention).

years. He was lawfully admitted in 1986 at the age of 18. Both his parents and one sister are United States citizens. His other siblings are lawful permanent residents. Respondent has no family in Haiti. Pet. App. 2a.

On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pled guilty to a controlled substance offense under Connecticut state law. Pet. App. 3a. At his immigration hearing, respondent conceded deportability under 8 U.S.C. 1227(a)(2)(A)(iii) and sought to apply for a waiver of deportation under former 8 U.S.C. 1182(c). Pet. App. 4a. The immigration judge (IJ) denied respondent the opportunity to apply on the ground that IIRIRA had repealed Section 1182(c) as of April 1, 1997. *Id.* The BIA affirmed. *Id.*

2. Respondent filed a writ of habeas corpus in the district court. The court found that IIRIRA "ha[d] not explicitly repealed" Section 2241 habeas jurisdiction and held that it retained habeas corpus jurisdiction over respondent's statutory retroactivity claim. Pet. App. 82a. On the merits, the district court held that the repeal of Section 1182(c) did not apply to respondent and reversed the order of the BIA.[12]

The Second Circuit affirmed. The court's jurisdictional ruling applied the unanimous holding issued the

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[12] The district court consolidated respondent's case with two other habeas corpus actions involving final orders of deportation (rather than removal), and the government contested the court's jurisdiction only in respondent's case. On the merits of the other two cases, the government appealed only one, which is pending before the court of appeals. *Domond v. INS*, No. 99-2619 (2d Cir.).

same day by the same panel in *Calcano-Martinez v. INS*, stating that the INS's jurisdictional arguments were "foreclosed by [the] decision in *Calcano-Martinez*." Pet. App. 6a. The court ruled that, in light of *Calcano-Martinez*, "the permanent rules of IIRIRA do not divest Article III courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available" because of the restriction in Section 1252(a)(2)(C). *Id.* (citing *Calcano-Martinez*).

On the merits, the court of appeals considered whether AEDPA or IIRIRA had eliminated eligibility for Section 1182(c) relief for immigrants in removal proceedings. The court applied the two-step test of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), to determine (1) whether Congress had expressly prescribed the temporal reach of AEDPA and IIRIRA, and (2) absent such express command, whether eliminating eligibility for Section 1182(c) relief would have "retroactive effect." Pet. App. 13a (quoting *Landgraf*).

Under step one, the court rejected the government's contention that the 1996 amendments contained an express command indicating that the amendments applied retroactively to all cases and found that both AEDPA and IIRIRA were ambiguous, with "no clear evidence that Congress considered and decided" that the amendments regarding Section 1182(c) should apply to an alien "who pled guilty to the underlying criminal conduct before [the amendments'] enactment." Pet. App. 21a. In finding that the temporal reach of the amendments was ambiguous, the court also rejected respondent's contention that the language and structure of

IIRIRA demonstrated that Congress explicitly intended IIRIRA to apply only *prospectively* to post-enactment convictions. *Id.* n.5.

The court of appeals then turned to the second *Landgraf* step, *i.e.*, "whether applying IIRIRA § 304(b) to pre-enactment convictions is impermissibly retroactive." Pet. App. 23a. The opinion first noted the difference between, on the one hand, the act of committing a criminal offense and, on the other hand, the act of pleading guilty in lieu of going to trial. Pet. App. 25a. The court of appeals rejected finding a retroactive effect based solely on criminal *conduct* that occurred before AEDPA and IIRIRA. Pet. App. 26a. But the court held that a *guilty plea* entered into before the change in law was different. Aliens charged with crimes, the court noted, "factor the immigration consequences of conviction in deciding whether to plea or proceed to trial[,]" *id.* (citations omitted), because the availability of relief from deportation is an important consideration at the plea stage and criminal defense counsel are commonly required to advise immigrants of the immigration consequences of a guilty plea. Pet. App. 27a. At the time of respondent's pre-AEDPA/IIRIRA plea, the court explained, "there was a strong possibility that [an immigrant] would receive relief" if his application for Section 1182(c) relief were adjudicated. Pet. App. 28a (citing *Tasios*, 204 F.3d at 551). Therefore, the court concluded, eliminating respondent's eligibility for a Section 1182(c) waiver "eradicates a form of relief previously available . . . [and] attach[es] new substantive legal consequences to a guilty or *nolo contendere* plea. . . . " Pet. App. 30a.

Judge Walker dissented on the merits. He concluded that, under step one of *Landgraf*, IIRIRA's repeal of former

Section 1182(c) applied to all removal cases regardless of the date of the criminal conduct, conviction, or plea and, alternatively, that under step two, the elimination of discretionary relief does not have retroactive effect. *Id.*

REASONS FOR DENYING THE WRIT

Neither of the questions presented by the petition for *certiorari* should be reviewed by the Court in this case. The jurisdictional question, if reviewed at all, should be addressed in *Calcano-Martinez v. INS, petition for cert. filed,* (Dec. 20, 2000), where the issue is more fully presented. The merits question is not worthy of review because it raises no broad issues of retroactivity, is limited to a closed set of cases and correctly applies this Court's retroactivity jurisprudence.

1. *Jurisdiction.* The jurisdictional issue should not be reviewed by this Court but is, in any case, more completely presented in the *certiorari* petition in *Calcano-Martinez.*

a. Respondent acknowledges that the courts of appeals are divided on the general issue of the district courts' habeas corpus jurisdiction to review challenges to final orders of removal governed by 8 U.S.C. 1252(a)(2)(C). That circuit split, however, simply leaves standing an already-existing division that has been present under IIRIRA's transitional jurisdictional rules since 1998. The majority of circuits held, like the Second Circuit here, that habeas corpus under 28 U.S.C. 2241 remained available for the type of statutory retroactivity claim presented by this respondent. *See* note 6, *supra.* But the

Seventh Circuit held that all such claims could be heard (if at all) only by a petition for review. *See LaGuerre*, 164 F.3d at 1040. Notwithstanding the substantial number of cases subject to these divergent rulings,[13] this Court several times declined to resolve that jurisdictional split.[14]

Moreover, under the permanent rule cases, the decisions of the Fifth and Eleventh Circuits cited by petitioner (Pet. Br. 19-20), did not squarely rule on the availability of habeas jurisdiction to review claims that cannot be brought by a petition for review. The Fifth Circuit in *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), found that habeas corpus was repealed for immigrants governed by Section 1252(a)(2)(C), but the specific claim presented by the alien in that case was whether a new ground of deportation applied to him. The Fifth Circuit held that the claim could have been presented in a petition for review (and that the alien would lose on the merits). *See id.* at 199-201. The decision does not squarely hold that habeas corpus is never available, even for claims that are barred from being heard in a petition for review.[15] The Eleventh Circuit's ruling in *Richardson v.*

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[13] *See, e.g.*, Brief for Petitioner [Reno] at 24, *Reno v. Navas*, No. 98-996 (noting thousands of cases potentially governed by jurisdictional holding).

[14] *Compare Reno v. Goncalves*, 526 U.S. 1004 (1999) *and Reno v. Navas*, 516 U.S. 1004 (1999) (circuit rulings requiring challenge by habeas corpus) *with LaGuerre v. Reno*, 120 S. Ct. 1157 (2000) (circuit decision requiring challenge by petition for review) *and Richardson v. Reno*, 120 S. Ct. 1529 (2000) (same for removal cases).

[15] *See* Brief for Respondents [Reno et al.] at 18, *Max-George v. Reno*, No. 00-6280 (explaining that "petitioner plainly could

Reno, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000), was similarly limited. As the petitioner states, that case challenged the alien's detention during removal proceedings, and not the removal order itself – which had not yet issued. Pet. Br. 20 n.16 (acknowledging that *Richardson* concerns detention and not a final removal order). Subsequent decisions of the Fifth and Eleventh Circuits have applied the rulings in *Richardson* and *Max-George* without additional analysis regarding claims that could not be heard in a petition for review.[16]

b. The Second Circuit's ruling in this case that respondent's claims are reviewable in a district court habeas corpus action under 28 U.S.C. 2241 is correct and based on the settled precedent of this Court. The Second Circuit's statutory interpretation relies on the clear statement rule of *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to find that Congress has not legislated with sufficient specificity to repeal 28 U.S.C. 2241.

Equally important, the court of appeals' resolution avoids the serious constitutional issues raised by the

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have raised [his challenge that he was not actually removable] in a petition for review in the court of appeals, but he failed to do so" and that decision "does not present [the] constitutional concern [of complete denial of judicial review] because . . . a judicial forum was indeed available").

[16] *See* Pet. Br. 20 nn.15 & 16 (citing *Perez v. Reno*, 227 F.3d 294 (5th Cir. 2000); *Garnica-Vasquez v. Reno*, 210 F.3d 558 (5th Cir. 2000); *Finlay v. INS*, 210 F.3d 556 (5th Cir. 2000); *Russell v. Reno*, 216 F.3d 1091 (11th Cir. 2000), *petition for cert. pending*, No. 00-5970; *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000)).

petitioner's contention that *no* court may review respondent's statutory retroactivity claim. Pet. Br. 25-26. Petitioner argues that complete preclusion of respondent's statutory claim is constitutionally permissible and does not even raise "constitutional concerns." Pet. Br. 25. Yet decades of consistent judicial adjudication confirm that the scope of review mandated by the Constitution's Suspension of Habeas Corpus Clause, Art. I., § 9, cl. 2, encompasses both constitutional and statutory claims of the type raised here. The Second Circuit has exhaustively reviewed this authority and concluded that the government's contention that "no court has the power to review [the Attorney General's] interpretation of the immigration laws . . . is . . . at war with the historical record . . . [and] the core conception of habeas corpus as it has been applied over many centuries." *Henderson v. INS*, 157 F.3d at 120. Indeed, "the traditional Great Writ was largely a remedy against executive detention," which is at issue here, *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring), and in that context encompasses errors of law.

Even apart from the particular force of the Suspension Clause, Article III does not permit respondent's legal claims to be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to a judicial forum, *see Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Similarly, the Due Process Clause requires judicial review of respondent's statutory claims because deportation of a long-time legal resident implicates fundamental interests "basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

In light of these concerns, the Second Circuit properly rejected the contention that IIRIRA prohibits review in *any* court of respondent's claims. The court of appeals correctly ruled that respondent may obtain review of his claims in district court under Section 2241.[17]

c. If the Court determines that review of the jurisdictional question is warranted, then the Court should grant review of that issue in *Calcano-Martinez* because it is the more complete and appropriate vehicle.

First, as the petitioner explains, *Calcano-Martinez* is the decision in which the Second Circuit issued its principal jurisdictional holding, and the jurisdictional issue in this case was simply disposed of under the *Calcano-Martinez* ruling.[18]

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[17] Respondent's particular circumstances would raise ancillary issues if this Court were now to hold that the Second Circuit erred and that respondent's claims can be reviewed only by a petition for review. The Second Circuit concluded that its decision finding a repeal of its own petition-for-review jurisdiction under IIRIRA's permanent provisions was compelled by the circuit's prior precedent construing the transitional provisions. Pet. App. 6a. If this result were now to change, respondent must be entitled to pursue his claims in some judicial forum to avoid unfairness. *Cf. Singh v. Perryman*, 182 F.3d 504, 508-09 (7th Cir. 1999) *and Turkhan v. Perryman*, 188 F.3d 814, 824 (7th Cir. 1999) (finding that change in circuit jurisdictional law constitutes manifest injustice and requires finding alternative jurisdictional basis).

[18] The Solicitor General acknowledges that *Calcano-Martinez* constitutes the Second Circuit's decision on the jurisdictional issue but explains that the government did not seek review from that decision because the government "nominally prevailed" (Pet. Br. 19 n.13) when the court of appeals dismissed the petition for review for lack of jurisdiction

Second, in *Calcano-Martinez* the three immigrants had filed *both* a petition for review and a habeas corpus petition (raising the same types of statutory and constitutional claims as are presented in this case). Pet. App. 42a. The court of appeals in *Calcano-Martinez* thus exhaustively addressed the court's own petition-for-review jurisdiction as well as the district courts' habeas corpus jurisdiction.[19] Pet. App. 54a-73a; Pet. Br. 11. The court's conclusion that jurisdiction lay in habeas corpus was inextricably intertwined with its predicate determination that the circuit's petition-for-review jurisdiction was repealed by 8 U.S.C. 1252(a)(2)(C). As the circuit courts agree, the role of habeas corpus to review final removal orders cannot be divorced from the petition-for-review jurisdiction of the courts of appeals in light of Section 1252(a)(2)(C).

Moreover, as the circuits have recognized, a profound constitutional question arises if *no* court – either in habeas corpus or by petition for review – has jurisdiction over respondent's claims. Therefore, whether either avenue has been repealed cannot be separated from whether the alternative avenue has been preserved. The availability of habeas review must be considered in light of the full statutory and constitutional framework in order not to needlessly embroil the Court in constitutional adjudication.

(albeit on grounds with which the government disagreed). Pet. App. 6a.

[19] The immigrants in *Calcano-Martinez* had previously filed district court habeas actions, but they had not been adjudicated by the district court at the time of the court of appeals' decision.

2. *Retroactivity*. The court of appeals' holding that former Section 1182(c) is not repealed in the case of immigrants who pled guilty to a deportable offense before AEDPA and IIRIRA is correct and does not warrant review. The question does not raise an issue of broad significance because it affects only a discrete number of cases, has not generated any substantial disagreement among the circuits (and should await a definitive resolution of the jurisdictional question).

a. The court of appeals' decision raises no question of broad application under the now well-established framework for resolving retroactivity issues. Four recent decisions of this Court have exhaustively addressed how courts are to determine if a new statute applies to pre-enactment conduct. *See Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The issue presented here raises no new questions regarding the proper judicial approach for discerning whether Congress intended a statute to apply retroactively.

This case concerns only the application of the settled retroactivity test to the particular statute at issue in this case, and, even more narrowly, to the particular circumstances raised by the respondent under that statute (*i.e.*, guilty pleas). Petitioner does not contend that the court of appeals misstated the governing test or failed to apply it in this case. The court of appeals properly followed the two-step test mandated by *Landgraf* and considered, first, whether Congress had expressed its intent that the new statute apply retroactively and second, finding no clear congressional intent, whether the statute would have an

impermissible "retroactive effect" if applied to respondent's case. Petitioner's only quarrel is with the result of the court of appeals' application of that established test to the particular circumstances presented here. But, as to that question, only two courts of appeals have spoken and, as set forth more fully below, *see* 2.c., *infra*, it is premature for this Court to grapple with that narrow issue.

b. The court of appeals' decision governs only a discrete and diminishing number of removal cases and hence has no enduring significance. The ruling preserves the availability of Section 1182(c) only for a fixed number of immigrants whose factual circumstances are the same as those presented by respondent. The impact of the decision is necessarily short-lived and its scope is limited because immigrants qualify for Section 1182(c) under the court of appeals' decision only if they meet three specific conditions.

First, the relevant conduct must, of course, have occurred before the effective dates of AEDPA and IIRIRA. Otherwise it does not constitute pre-enactment conduct, and is concededly governed by all of the AEDPA and IIRIRA restrictions on eligibility.

Second, the court of appeals found retroactive effect *only* if the immigrant actually pled guilty (or *nolo contendere*). The court of appeals specifically distinguished cases where the immigrant was convicted after trial, Pet. App. 31a, or where the only pre-enactment conduct was the commission of the criminal act. Pet. App. 25a. Therefore, under the court of appeals' decision, the only immigrants in removal proceedings entitled to pursue a claim for

Section 1182(c) relief are those with guilty pleas before AEDPA and IIRIRA.

Finally, and significantly, the court of appeals' decision left in place the pre-AEDPA/IIRIRA restrictions on eligibility for Section 1182(c) relief. Thus, with the exception of aberrational cases, only immigrants who are released from incarceration before the end of 2001 could benefit from the court's ruling. Immigrants still imprisoned at that time are virtually certain to be barred from Section 1182(c) eligibility regardless of the ruling in this case because they will be unable to satisfy a critical pre-AEDPA/IIRIRA criterion for Section 1182(c) relief, namely, that their term of imprisonment must be less than five years. *See* Pet. Br. 3 (noting five-year bar in pre-AEDPA Section 1182(c)).[20] Petitioner's focus on the date

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[20] Before the 1996 amendments, Section 1182(c) already prohibited relief to immigrants whose disqualifying aggravated felony offense resulted in their imprisonment for five years or longer. 8 U.S.C. 1182(c) (1994) (immigrant convicted of aggravated felony disqualified if has served "a term of imprisonment of at least five years"). That pre-AEDPA restriction applies to all applications and is unaffected by this decision because it was part of Section 1182(c) before AEDPA or IIRIRA. Given that the court of appeals' decision requires a plea that pre-dates AEDPA and that sentencing and incarceration occurs upon entry of a plea (*see generally* 18 U.S.C. 3143 (mandating detention upon finding of guilt), 18 U.S.C. 3585 (calculating length of imprisonment from date of detention)), any immigrant with an aggravated felony conviction who remains in prison past the middle or end of 2001 would almost certainly be barred from eligibility for Section 1182(c) on the ground of having been imprisoned five years or more. (The five-year rule does not apply to *non*-aggravated felonies, but those immigrants would be eligible for "cancellation of removal" and

of conviction without regard to the term of imprisonment (or whether the alien pled guilty) is, therefore, misplaced.

c. Only two courts of appeals, the Second and Ninth, have squarely addressed whether an immigrant subject to removal proceedings remains eligible to apply for Section 1182(c). They agree in most respects and disagree only marginally.

In *Richards-Diaz v. Fasano*, the Ninth Circuit held that some immigrants in removal proceedings remain eligible for Section 1182(c) waivers. It ruled that immigrants who entered into pre-AEDPA/IIRIRA guilty pleas in reliance on the availability of Section 1182(c) are entitled to apply for such relief in removal proceedings because elimination of eligibility under those particular circumstances would have an impermissible retroactive effect. *See* 2000 WL 1715956, at *4 (impermissible retroactive effect if "plea was entered in reliance on the availability of discretionary waiver under [Section 1182(c)]") (citation omitted).

The Second and Ninth Circuits thus agree that IIRIRA did not completely repeal Section 1182(c) eligibility for immigrants in removal proceedings, that the elimination of relief from deportation may have a retroactive effect under some circumstances, and that the critical pre-enactment conduct on which eligibility depends is a guilty plea entered into before AEDPA was enacted. Moreover, both courts found that other pre-enactment conduct, such as the commission of the offense or a

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would not be seeking Section 1182(c) relief. 8 U.S.C. 1129b(a)(3)).

conviction after trial, would *not* preserve eligibility for Section 1182(c). Pet. App. 25a-26a; *Richards-Diaz*, 2000 WL 1715956, at *4. Therefore, the threshold requirement in both circuits is the same, *i.e.*, whether the immigrant *pled guilty* before AEDPA's enactment on April 24, 1996.

The only disagreement between the Second and Ninth Circuits concerns which pre-AEDPA guilty pleas preserve eligibility for Section 1182(c) relief. The Ninth Circuit requires a showing of specific reliance on Section 1182(c) at the time of the guilty plea, 2000 WL 1715956, at *4, while the Second Circuit does not require such an individualized showing. Pet. App. 30a. That difference in outcome is not sufficient to warrant this Court's attention, especially when neither circuit has yet elaborated on how it will apply its formulation and other circuits have not yet squarely addressed the question.

One essential lesson of the transitional rule decisions under AEDPA 440(d) is that development in the circuits is especially appropriate on the retroactivity issue because apparent splits may be resolved or substantially narrowed by subsequent circuit court decisions. For example, in *LaGuerre v. Reno*, the Seventh Circuit appeared definitively to foreclose all Section 1182(c) eligibility for immigrants in deportation proceedings as of AEDPA's enactment. Yet, a few months ago in *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000), the Seventh Circuit significantly refined its view and limited the effect of *LaGuerre*. *Jideonwo* held that immigrants in deportation proceedings who relied on Section 1182(c) when they entered into pre-AEDPA pleas remain eligible for Section 1182(c) relief

notwithstanding the *LaGuerre* decision.[21] Until the circuits squarely address the precise issue in a case that directly presents it, predictions of a likely or permanent disagreement are premature.[22]

d. The court of appeals' decision was correct. The government argues that Congress expressly intended to repeal Section 1182(c) for immigrants in removal proceedings based on the fact that IIRIRA replaced "deportation" with "removal" procedures and that the repeal of Section

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[21] *Jideonwo* held that AEDPA 440(d) cannot be applied to an alien "who pled guilty . . . before the enactment of AEDPA and relied, at least in part, on the availability of [Section 1182(c)] relief. . . . " 224 F.3d at 700. The court explained that "an alien accused of a crime that carries a lengthy sentence [may] enter into a plea agreement that would preserve his eligibility" for Section 1182(c) relief. *Id.*

[22] Thus, even though the Ninth Circuit expressed its disagreement with the Second Circuit's analysis of congressional intent, 2000 WL 1715956, at *3-*4 & n.4, the two courts, as noted above, differ only minimally in terms of *result*. Petitioner cites decisions from the Seventh and Eleventh Circuits and asserts that these cases "cannot be squared" with the Second Circuit's decision. Pet. Br. 28. Yet neither of the cases constitute a true conflict with this case or *Richards-Diaz*. Pet. Br. 28-29. *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000), concerned a constitutional claim regarding the timing of INS's initiation of proceedings. The court specifically stated that "we do not face a question of retroactivity" but rather the question of "at what point proceedings . . . commence." *Id.* at 981. *Galindo-Del Valle v. Attorney General*, 213 F.3d 594 (11th Cir. 2000), rejected a constitutional challenge to AEDPA 440(d) on the ground that the alien lacked standing to bring the claim. The alien there did not bring any challenges – statutory or constitutional – to *IIRIRA*'s effect on Section 1182(c). Therefore, the Eleventh Circuit had no occasion to decide the retroactivity question presented to the Second Circuit in this case.

1182(c) took *effect* on April 1, 1997. Pet. Br. 27. But in *Landgraf* this Court underscored that only express and unambiguous language that lends itself to no other interpretation is sufficient to conclude that Congress intended to reach pre-enactment conduct. *See Landgraf*, 511 U.S. at 245. The Court rejected reliance on a general effective date provision because "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* at 257. IIRIRA does not contain any express statement of congressional intent to apply the repeal of Section 1182(c) retroactively to cases (be they deportation or removal) involving pre-enactment guilty pleas. The government's further contention that deportation statutes are not subject to the presumption against retroactivity is contrary to this Court's unanimous holding in *Hughes Aircraft* that *all* statutes (except those that are purely jurisdictional), including new laws that eliminate defenses rather than imposing new grounds of liability, are presumed to apply only prospectively. *See Hughes*, 520 U.S. at 946. The court of appeals thus correctly applied the presumption against retroactivity and, moreover, based its narrow preservation of Section 1182(c) on its observation that immigrants consider the immigration consequences and the availability of discretionary relief at the time of a plea.[23]

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[23] The petitioner's reliance on *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is misplaced. Pet. Br. 27-28 & n.19. *Lopez-Mendoza* concerned application of the exclusionary rule in a case where an alien with no lawful status

CONCLUSION

Respondent submits that the *certiorari* petition should be denied. Alternatively, if the Court determines that review of the jurisdictional question is warranted, *certiorari* should be granted instead (or in addition) in *Calcano-Martinez*.

Respectfully submitted,

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sought to remain in the United States. Its analysis bears little relationship to the question of whether a new statute should be applied retroactively to pre-enactment conduct, thereby repealing a longstanding, legislatively-established form of relief. There is no "ongoing violation" of the immigration laws if the BIA erred in its interpretation of IIRIRA and *Congress* never intended to repeal eligibility for relief retroactively. Similarly, *Chevron* does not usurp the courts' obligation to apply the *Landgraf* test to determine whether Congress has expressed the requisite intent to apply a new law retroactively.

Supreme Court, U.S.
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No. 00-767

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Alanis-Bustamante v. *Reno*, 201 F.3d 1303 (11th Cir. 2000)	3
Brady v. *United States*, 397 U.S. 742 (1970)	10
Calcano-Martinez v. *INS*, 232 F.3d 328 (2d Cir. 2000), petition for cert. pending, No. 00-1011	3
DeSousa v. *Reno*, 190 F.3d 175 (3d Cir. 1999)	8
Galindo-Del Valle v. *Attorney General*, 213 F.3d 594 (11th Cir. 2000), petition for cert. pending, No. 00-362	7
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997)	9
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996)	4
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000)	8
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	8, 9
Matter of Marin, 16 I.&N. Dec. 581 (B.I.A. 1978)	10
Max-George v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280	2
Morales-Ramirez v. *Reno*, 209 F.3d 977 (7th Cir. 2000)	3, 7
Perez v. *Reno*, 227 F.3d 294 (5th Cir. 2000)	3
Reno v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999)	5
Requena-Rodriguez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999)	8
Richards-Diaz v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000)	6
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000)	2
Russell v. *Reno*, No. 99-10084 (11th Cir. May 9, 2000),	3
petition for cert. pending, No. 00-5970	3
Vargas-Gonzalez v. *INS*, 647 F.2d 457 (5th Cir. 1981)	6

Statutes:	Page
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 *et seq.*	5
§ 440(d), 110 Stat. 1277	8
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 *et seq.*	1
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1182(c) (1994)	4, 5, 6, 7, 8, 9, 10
8 U.S.C. 1182(h) (1994 & Supp. V 1999)	3
8 U.S.C. 1229b (Supp. V 1999)	6
8 U.S.C. 1229b(a) (Supp. V 1999)	6
8 U.S.C. 1229b(d)(1) (Supp. V 1999)	6
8 U.S.C. 1252(a)(2) (Supp. V 1999)	2,3
8 U.S.C. 1252(a)(2)(B) (Supp. V 1999)	3
28 U.S.C. 2241	1, 2

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REPLY BRIEF FOR THE PETITIONER

1. *Jurisdiction.* Respondent concedes (Br. in Opp. 14) that the jurisdictional ruling of the Second Circuit in this case—holding that the district court had habeas corpus jurisdiction under 28 U.S.C. 2241 to review the merits of respondent's challenge to his final removal order—conflicts with decisions of the Fifth and Eleventh Circuits, which hold that, in the permanent judicial-review provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 *et seq.* (IIRIRA), Congress has precluded the district courts from entertaining challenges to final removal orders on habeas corpus. Respondent argues (Br. in Opp. 14-15), however, that this conflict among the circuits does not warrant review because it merely extends a similar division of authority concerning judicial review under the *transitional* rules of IIRIRA, which this Court previously declined to

review. See Pet. 6; Br. in Opp. 9. Respondent ignores the critical distinction between transitional rules and permanent rules. The Court may well have declined to review those earlier decisions precisely because they involved only IIRIRA's transitional rules. By contrast, the division of authority on jurisdiction under the *permanent* rules at issue in this case will extend indefinitely into the future unless it is resolved by this Court.

Respondent also argues (Br. in Opp. 15-16) that the Fifth and Eleventh Circuits' decisions do not squarely conflict with the decision of the Second Circuit in this case because those decisions denied district court jurisdiction for claims that could have been raised on a petition for review to the court of appeals, while the claim in this case for which the Second Circuit permitted district court review could not have been raised on petition for review as a result of the preclusion of review in 8 U.S.C. 1252(a)(2) (Supp. V 1999) for claims raised by criminal aliens. Neither the Fifth Circuit nor the Eleventh Circuit, however, so qualified its jurisdictional ruling; both ruled broadly that Congress had completely precluded the district courts from reviewing removal orders under 28 U.S.C. 2241.[1] Both courts have also relied on those broad rulings to hold in subsequent cases that the same bar to district court habeas corpus review applied to an alien whose claim could not be entertained by the court

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[1] See *Max-George* v. *Reno*, 205 F.3d 194, 199 (5th Cir. 2000) ("Accordingly, we hold that IIRIRA's permanent provisions eliminate § 2241 habeas corpus jurisdiction for those cases that fall within § 1252(a)(2)(C)."), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) ("IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings and detention pending removal proceedings. * * * [IIRIRA's permanent rules] constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders, removal proceedings, and detention pending removal."), cert. denied, 120 S. Ct. 1529 (2000).

of appeals under Section 1252(a)(2).[2] The Seventh Circuit has also concluded that IIRIRA divested the district courts of their authority to review removal orders by habeas corpus. See *Morales-Ramirez* v. *Reno*, 209 F.3d 977, 980 (7th Cir. 2000). And the Second Circuit, in the companion case to the decision below in this case, recognized that its jurisdictional ruling conflicts with the decisions of the Fifth and Eleventh Circuits. See Pet. App. 57a-59a. The conflict in the circuits is therefore well developed and warrants this Court's review.

Respondent suggests (Br. in Opp. 18-19) that, because the court of appeals in this case relied on and applied its jurisdictional decision in the companion case of *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), petition for cert. pending, No. 00-1011, the Court should grant review in *Calcano* rather than (or in addition to) this case to resolve the intertwined issues of court of appeals and district court jurisdiction over aliens' challenges to final removal orders. For the reasons set forth in our response (at 15-17) to the petition in *Calcano*, we submit that the Court should grant review in both *Calcano* and this case, so that the Court will have before it a case filed in the district court as well as a case filed in the court of appeals, and will also have before it the court of appeals' jurisdictional analysis in both settings.

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[2] See *Perez* v. *Reno*, 227 F.3d 294 (5th Cir. 2000) (alien who was barred by 8 U.S.C. 1252(a)(2)(B) (Supp. V 1999) from challenging on petition for review denial of eligibility for waiver of inadmissibility under 8 U.S.C. 1182(h) (1994 & Supp. V 1999) also could not present that challenge on habeas corpus); *Russell* v. *Reno*, No. 99-10084 (11th Cir. May 9, 2000), slip op. 2 (per curiam) (relying on *Richardson* to hold that district court lacked habeas corpus jurisdiction over alien's challenge to his removal order), petition for cert. pending, No. 00-5970; see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307 n.8 (11th Cir. 2000) (noting that, in *Richardson*, the Eleventh Circuit held that "under the permanent provisions of IIRIRA, an alien may not seek habeas review of any aspect of his removal").

As respondent observes, the jurisdictional issues in the two cases are closely related, but resolution of the jurisdictional issue in one case would not necessarily dictate a particular outcome in the other case. Review in both cases would allow the Court to resolve definitively whether (and if so, where) an alien convicted of an aggravated felony may present a challenge to a final removal order.

2. *Merits.* Respondent contends (Br. in Opp. 20-21) that the court of appeals' decision does not warrant review because it merely applied the Court's settled retroactivity jurisprudence in this particular context. The correct application of retroactivity principles in the immigration context, however, is a matter of very substantial importance to the proper administration of the Immigration and Nationality Act (INA). None of this Court's four most recent retroactivity decisions cited by respondent (*id.* at 20) addressed any issue involving immigration cases. Moreover, rather than applying settled principles, the Second Circuit's ruling on the merits diverges from a long line of this Court's cases holding that Congress may expand the bases on which an alien may be deported, or be denied relief from deportation, without running afoul of retroactivity principles, as Judge Walker observed in his dissent below (Pet. App. 33a-34a; see Pet. 27-28).[3]

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[3] Respondent does not challenge the Attorney General's determination that he is removable from the United States. He contends only that the Attorney General erred in concluding that discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) is not available to him because that Section has been repealed. Even when it was in effect, however, Section 1182(c) conferred no substantive or individual rights on an alien. Rather, it conferred a discretionary power on the Attorney General to relieve an alien of the consequences of his ongoing violation of the law. As with other grants of discretionary authority under the INA, the exercise of such authority is an "act of grace," like "the President's power to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

If the ruling on the merits is permitted to stand, the Second Circuit's decision that a statutorily-imposed restriction on the Attorney General's authority to grant discretionary relief from removal is "retroactive" if applied to the case of an alien who was convicted before the restriction was enacted will have potentially broad consequences for Congress's ability to adjust the terms on which criminal aliens, among others, may be removed. This Court has never viewed such adjustments to raise any concern about retroactivity. Indeed, as the Court recently noted in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999), removal of an alien according to the terms of a statute setting forth the categories of aliens whose presence in this country Congress has deemed to be contrary to the national interest is intended "to bring to an end *an ongoing violation* of United States law," not to impose punishment for a prior act.

Respondent also maintains (Br. in Opp. 21-23) that the decision below has limited significance because it potentially provides relief only to aliens who pleaded guilty to a criminal offense before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 *et seq.* (AEDPA), and will be released from incarceration before the end of 2001 (because even before AEDPA, aggravated felons could not obtain relief from deportation under 8 U.S.C. 1182(c) (1994) if they had served five years in prison for the aggravated felony offense). Even that set of aliens, however, is very large. As this Court is well aware, the vast majority of criminal cases in this country are resolved by guilty plea; and as we point out in the certiorari petition (at 29-30), in just the first year in which IIRIRA was effective, the Executive Office for Immigration Review adjudicated 13,000 removal cases involving aggravated felons. The potential number of aliens affected by this issue, therefore, may well exceed 50,000. Moreover, the issue of the continued availability of relief

under former Section 1182(c) potentially affects even aliens who are not aggravated felons, because several of the terms of eligibility for relief under IIRIRA's discretionary cancellation-of-removal provision, 8 U.S.C. 1229b (Supp. V 1999), are more strict than were the terms of eligibility under former Section 1182(c).[4]

Respondent acknowledges (Br. in Opp. 23-24) that the decision below is inconsistent with the decision of the Ninth Circuit in *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (Nov. 17, 2000), which held generally (*id.* at *3-*4) that aliens who were convicted (even upon a guilty plea) of an aggravated felony before AEDPA was enacted are *not* eligible for relief under former Section 1182(c) if they were placed in removal proceedings after IIRIRA became effec-

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[4] For example, before AEDPA, a lawful permanent resident alien could obtain relief from deportation under Section 1182(c) if he had had a lawful unrelinquished domicile in this country of seven years, see 8 U.S.C. 1182(c) (1994), and the courts had held that the period that an alien spent in deportation proceedings should be counted towards that seven-year eligibility requirement, see, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981). Under IIRIRA, by contrast, to obtain cancellation of removal, a legal permanent resident alien must show both that he had been lawfully admitted for permanent residence in the United States for five years *and* that he had resided continuously here for seven years. See 8 U.S.C. 1229b(a) (Supp. V 1999). In addition, the alien's period of continuous residence is deemed to have ended whenever the alien committed a criminal offense rendering him removable or was served with a notice to appear commencing removal proceedings. See 8 U.S.C. 1229b(d)(1) (Supp. V 1999). The latter restriction in particular has been quite significant in rendering ineligible for cancellation of removal even aliens who were convicted of offenses that were not aggravated felonies and who would have been eligible for relief under former Section 1182(c). A petition involving one such alien is presently before the Court. See *Zalawadia* v. *Reno*, No. 00-268. In our response to that petition (at 11-12), we informed the Court that Congress was considering a bill that would have ameliorated the effect of that restriction for aliens who were convicted before IIRIRA became effective. We are informed, however, that Congress adjourned without passing that legislation.

tive. But respondent attempts to minimize that division of authority by pointing out that the Ninth Circuit recognized a "limited exception" to that general rule for an alien who could show that he pleaded guilty in specific reliance on the state of the law at the time, under which he would have been eligible for relief under Section 1182(c). *Id.* at *4. The Second Circuit, however, ruled much more broadly that *all* aliens who had pleaded guilty to the disqualifying offenses before AEDPA and IIRIRA were enacted remained eligible for relief under Section 1182(c), whether or not they had acted in specific reliance on their eligibility for discretionary relief from deportation. The Ninth Circuit, moreover, expressly endorsed the reasoning of Judge Walker's dissent from the Second Circuit's ruling in this case. *Id.* at *3-*4.

In addition, as we point out in the certiorari petition (at 28-29), the decision below on the merits cannot be squared with the Seventh Circuit's decision in *Morales-Ramirez* v. *Reno*, *supra*, or the Eleventh Circuit's decision in *Galindo-Del Valle* v. *Attorney General*, 213 F.3d 594 (2000), petition for cert. pending, No. 00-362. Respondent seeks to distinguish those cases on the ground that they presented constitutional challenges to the unavailability of relief under Section 1182(c). See Br. in Opp. 25 n.22. In each of those cases, however, the predicate for the court of appeals' ruling was that Section 1182(c) had been repealed in its entirety with respect to aliens, like respondent, who had pleaded guilty prior to IIRIRA and had been placed in removal proceedings on or after April 1, 1997. See *Morales-Ramirez*, 209 F.3d at 978, 981, 983; *Galindo-Del Valle*, 213 F.3d at 596, 598-599. Accordingly, respondent's efforts to avoid the inconsistency between the decision below and the decisions in *Morales-Ramirez* and *Galindo-Del Valle* are unavailing.

The decision below also cannot be reconciled with decisions of the Third, Fifth, and Tenth Circuits holding that aliens who were convicted of aggravated felonies before AEDPA was enacted but who were placed in *deportation*

proceedings after AEDPA's enactment (but before the effective date of IIRIRA's permanent provisions) are barred by Section 440(d) of AEDPA, 110 Stat. 1277, from obtaining relief from deportation under Section 1182(c).[5] *A fortiori*, in those circuits, aliens who were placed in *removal* proceedings after the effective date of IIRIRA's permanent provisions (which altogether repealed Section 1182(c)) are not eligible for relief under Section 1182(c). Moreover, the Third, Fifth, and Tenth Circuits in those cases all concluded, under the second step of the framework of this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), that Congress's restriction in AEDPA Section 440(d) on the availability of discretionary relief from deportation for criminal aliens had no retroactive effect, because the enactment was intended to affect the alien's future status with regard to the legality of his continuing presence in the United States, not to impose punishment for past conduct, and therefore had only prospective effect within the meaning of this Court's retroactivity decisions.[6] In the decision below, by contrast, the Second Circuit concluded that a statutory restriction on the future availability of discretionary relief from deportation *does* have a "retroactive effect" within the meaning of this Court's decision in *Landgraf*. See Pet. App. 22a-32a. It follows, therefore, that the Third, Fifth, and Tenth Circuits would disagree with the Second Circuit's rationale as well as its ultimate decision in this case, because those circuits would conclude that Congress's outright repeal of former Section 1182(c) with respect to aliens placed in removal proceedings

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[5] See Pet. 5-6 n.4 (discussing *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 307-308 (5th Cir. 1999); and *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1149-1152 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000)).

[6] See *DeSousa*, 190 F.3d at 187; *Requena-Rodriguez*, 190 F.3d at 308; *Jurado-Gutierrez*, 190 F.3d at 1150-1152.

after April 1, 1997, had no retroactive effect on those aliens who would otherwise have been eligible for relief under that provision.

Nor is there merit to respondent's contention (Br. in Opp. 26) that the Second Circuit's decision is supported by *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946-951 (1997), where the Court held that jurisdictional statutes are subject to the presumption against retroactive application of federal statutes that was articulated in the second step of the *Landgraf* analysis. Although *Hughes* held that jurisdictional statutes establishing forums in which new causes of action may be heard are, like other statutes, subject to the presumption against retroactivity (see *id.* at 951), *Hughes* did not alter the test, set forth in *Landgraf*, for determining whether a statute is actually retroactive.[7] As we have explained (p. 4, *supra*; Pet. 27), legislative changes in the bases on which aliens may be removed affect prospectively the aliens' future status in the United States. It follows *a fortiori* that changes in the bases on which an alien may be granted discretionary relief from removal also affect only a form of prospective relief and do not trigger retroactivity analysis under *Landgraf*. The court of appeals therefore erred in concluding that Congress's repeal of Section 1182(c) had retroactive effect.[8]

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[7] See *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); cf. *id.* at 293 (Scalia, J., concurring in the judgment) ("Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.").

[8] Nor is the application to respondent of Congress's repeal of Section 1182(c) retroactive or fundamentally unfair merely because respondent pleaded guilty at a time when he would have remained eligible for relief under Section 1182(c) notwithstanding his conviction. This Court has observed that guilty pleas are often made in the face of considerable uncertainty, and that "judgments may be made that in light of later events

Finally, review is warranted on the court of appeals' ruling on the merits in this case to bring to an end the burgeoning litigation in the lower courts over the continued availability of relief under former Section 1182(c) for aliens placed in removal proceedings after that provision was repealed by Congress. As we note in the certiorari petition (at 29-30), dozens of aliens have already challenged their removal orders contending that they are eligible for discretionary relief under Section 1182(c), and thousands of other aliens are potentially affected by the issue and may challenge their removal orders in court. A delay in the definitive resolution of this issue will inevitably postpone the removal of criminal aliens, especially those convicted of aggravated felonies, who were among the principal objects of Congress's efforts to provide for expeditious removal.

* * * * *

For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted. The Court should also grant the petition in *Calcano-Martinez* v. *INS*, No. 00-1011, and the two cases should be consolidated for briefing and oral argument.

Respectfully submitted.

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seem improvident, although they were perfectly sensible at the time." *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970). Nor, indeed, does a guilty plea voluntarily made become defective merely because later developments in the law indicate that the plea "rested on a faulty premise." *Id.* at 757. An alien defendant who pleads guilty to an offense that may render him subject to deportation does not obtain vested rights in the state of the law at the time that may not be altered by Congress. Indeed, an alien such as respondent, who was convicted of a narcotics-trafficking offense, could have had no assurance whatsoever that he would have received discretionary relief from deportation under Section 1182(c) even if he had remained eligible to apply for such relief. See *Matter of Marin*, 16 I. & N. Dec. 581, 585-586 (B.I.A. 1978) (requiring alien convicted of narcotics trafficking offense to show "unusual or outstanding equities" in order to obtain relief under Section 1182(c)).

SETH P. WAXMAN
Solicitor General

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In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the Board of Immigration Appeals properly concluded that respondent is not eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective, even though he pleaded guilty and was convicted before that date.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	2
Summary of argument	15
Argument:	
I. The district court lacked jurisdiction to review the merits of respondent's challenge to the final order of removal entered against him	18
A. Congress has expressly provided that judicial review of final orders of removal is available only on petition for review in the court of appeals	18
B. Congress's withdrawal of district courts' authority to review removal orders does not raise constitutional concerns about suspension of habeas corpus	27
II. The Attorney General may not grant relief from deportation under former 8 U.S.C. 1182(c) to any alien placed in removal proceedings after April 1, 1997	32
A. Congress intended that relief under former Section 1182(c) not be available to any alien placed in removal proceedings after April 1, 1997	33
B. The inapplicability of Section 1182(c) in removal proceedings commenced on or after April 1, 1997 does not contravene any presumption against retroactivity	38
Conclusion	50

TABLE OF AUTHORITIES

Cases:	Page
Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990)	49
American Steel Foundries v. *Tri-City Cent. Trades Council*, 259 U.S. 184 (1921)	42, 43
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)	25
Brady v. *United States*, 397 U.S. 742 (1970)	47-48
Brownell v. *Tom We Shung*, 352 U.S. 180 (1956)	4
Bugajewitz v. *Adams*, 228 U.S. 585 (1913)	40
CFTC v. *Schor*, 478 U.S. 833 (1986)	49
Calcano-Martinez v. *INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (2001)	13, 18
Carlson v. *Landon*, 342 U.S. 524 (1952)	40
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	15, 48
Chew Heong v. *United States*, 112 U.S. 536 (1884)	40, 41
Chin Yow v. *United States*, 208 U.S. 8 (1908)	29
Duplex Printing Press Co. v. *Deering*, 254 U.S. 443 (1921)	42
Felker v. *Turpin*, 518 U.S. 651 (1996)	22-23, 24
Foti v. *INS*, 375 U.S. 217 (1963)	3, 4, 5, 19, 22, 42
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3
Galvan v. *Press*, 347 U.S. 522 (1954)	41
Gegiow v. *Uhl*, 239 U.S. 3 (1915)	29, 30
Harisiades v. *Shaughnessy*, 324 U.S. 580 (1952)	40, 41
Heikkila v. *Barber*, 345 U.S. 229 (1953)	4
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999)	22
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	48
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	39
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996)	28
Jay v. *Boyd*, 351 U.S. 345 (1956)	28
Johnson v. *Robison*, 415 U.S. 361 (1974)	30

Cases—Continued: Page

Kaiser Aluminum & Chem. Corp. v *Bonjorno*, 494 U.S. 827 (1990) 46
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 40
Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 29, 31
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 22
Land v. *Dollar*, 330 U.S. 731 (1947) 30
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 32, 33, 36, 38, 39, 40, 42, 45, 47
Lapina v. *Williams*, 232 U.S. 78 (1914) 44
Lindh v. *Murphy*, 521 U.S. 320 (1997) 35
Mahler v. *Eby*, 264 U.S. 32 (1924) 41
Marcello v. *Bonds*, 349 U.S. 302 (1955) 41
Martin v. *Hadix*, 527 U.S. 343 (1999) 37
Miller v. *French*, 120 S. Ct. 2246 (2000) 42
Mississippi Power & Light Co. v. *Moore*, 487 U.S. 354 (1988) 49
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 29, 30, 40
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 29
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976) 34
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 20-21, 40
Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 4
Silva, In re, 16 I. & N. Dec. 26 (BIA 1976) 3
Society for the Propagation of the Gospel v. *Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) 45
Soriano, In re, Interim Dec. No. 3289, 1996 WL 426888 (A.G. Feb. 21, 1997) 7
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1994) 29
Stone v. *INS*, 514 U.S. 386 (1995) 5, 22
Swain v. *Pressley*, 430 U.S. 372 (1977) 25, 30
Tod v. *Waldman*, 266 U.S. 113 (1924) 29

Cases—Continued: Page

United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 20
United States v. *Fausto*, 484 U.S. 439 (1988) 20
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 29
United States ex rel. Hintopoulos v. *Shaughnessy*, 353 U.S. 72 (1957) 28, 29
United States ex rel. Kaloudis v. *Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) 28, 40
Webster v. *Doe*, 486 U.S. 592 (1988) 30
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) 31
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 (1868) 23

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension of Habeas Corpus Clause) 2, 27, 32
Amend. V (Due Process Clause) 14
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657 ..... 10, 35
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
§ 401, 110 Stat. 1258 37
§ 401(e), 110 Stat. 1268 ..... 2, 6, 19, 24
§ 440, 110 Stat. 1276 2
§ 440(a), 110 Stat. 1276 ..... 6, 7
§ 440(d), 110 Stat. 1277 ..... 6, 8, 12, 43
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* 3, 19
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
Tit. III-A, 110 Stat. 3009-575 ..... 33, 34, 35, 36, 37, 38
§§ 301-308, 110 Stat. 3009-575 14
§ 303(a), 110 Stat. 3009-585 8

Statutes and regulations—Continued: Page

§ 304, 110 Stat. 3009-587 ..... 8, 9, 13, 14, 15, 34, 36, 37
§ 304(b), 110 Stat. 3009-597 29
§ 306(b), 110 Stat. 3009-612 10
§ 308(b)(6), 110 Stat. 3009-615 8
§ 309, 110 Stat. 3009-625 ..... 2, 36
§ 309(a), 110 Stat. 3009-625 ..... 9, 14, 34, 37
§ 309(c), 110 Stat. 3009-625 36
§ 309(c)(1), 110 Stat. 3009-625 ..... 9, 34, 35, 37
§ 309(c)(2), 110 Stat. 3009-626 35
§ 309(c)(3), 110 Stat. 3009-626 35
§ 309(c)(4)(A), 110 Stat. 3009-626 ..... 10, 26, 35
Tit. III-B, 110 Stat. 3009-627 ..... 36, 37, 38
§ 321, 110 Stat. 3009-627 38
§ 321(b), 110 Stat. 3009-628 37
§ 322, 110 Stat. 3009-628 38
§ 322(c), 110 Stat. 3009-629 37
§ 324, 110 Stat. 3009-629 38
Tit. III-C, 110 Stat. 3009-635 38
§ 347, 110 Stat. 3009-638 38
Immigration Act of 1917, ch. 29, § 3, 39 Stat. 878 44
8 U.S.C. 136(p) (1925) 44
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(43)(B) 2, 11
8 U.S.C. 1103(a)(1) (Supp. V 1999) 48
8 U.S.C. 1105a (1994) 10, 19
8 U.S.C. 1105a(a) (1994) 2, 3, 5, 10, 19, 26
8 U.S.C. 1105a(a)(10) (1994) 4, 6, 10, 19, 24, 25
8 U.S.C. 1105a(b) (1994) 4, 10, 25, 26
8 U.S.C. 1182(a) (1994) 43
8 U.S.C. 1182(a)(3) (1994) 43
8 U.S.C. 1182(c) (1994) ..... *passim*
8 U.S.C. 1225(b) (Supp. V 1999) 2
8 U.S.C. 1225(b)(1) (Supp. V 1999) 8, 10, 20, 23, 26

Statutes and regulations—Continued: Page

8 U.S.C. 1226 (1994) 8
8 U.S.C. 1227(a)(2) (Supp. V 1999) 47
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) 2, 6, 9
8 U.S.C. 1227(a)(4)(A) (Supp. V 1999) 47
8 U.S.C. 1228(b) (Supp. V 1999) 8
8 U.S.C. 1228(b)(3) (Supp. V 1999) 8
8 U.S.C. 1229 (Supp. V 1999) 8
8 U.S.C. 1229a (Supp. V 1999) 8
8 U.S.C. 1229b (Supp. V 1999) 9
8 U.S.C. 1229b(a) (Supp. V 1999) 2
8 U.S.C. 1229b(a)(3) (Supp. V 1999) 9
8 U.S.C. 1229b(b)(1)(C) (Supp. V 1999) 9
8 U.S.C. 1251(a)(2)(A)(iii) (1994) 2, 6
8 U.S.C. 1252 (Supp. V 1999) ..... *passim*
8 U.S.C. 1252(a) (Supp. V 1999) 23
8 U.S.C. 1252(a)(1) (Supp. V 1999) 10, 19, 20, 24, 31
8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) ..... *passim*
8 U.S.C. 1252(b)(1) (Supp. V 1999) 22
8 U.S.C. 1252(b)(6) (Supp. V 1999) 22
8 U.S.C. 1252(b)(9) (Supp. V 1999) 11, 20, 24, 31
8 U.S.C. 1252(e)(2) (Supp. V 1999) 8, 10, 20, 23, 24, 26
8 U.S.C. 1252b (1994) 8
28 U.S.C. 2241 ..... 2, 7, 18, 22, 23, 24
Conn. Gen. Stat. Ann. § 21a-277(a) (West 1994) 11, 12
Reorganization Plan No. V, 54 Stat. 1238 44
8 C.F.R.:
Section 3.44 8
Section 240.12(a) 42

Miscellaneous:

104 Cong. Rec. 17,172 (1958) 5
107 Cong. Rec. 12,177 (1961) 5
142 Cong. Rec. (1996):
pp. 5341-5344 37
p. 5962 37

Miscellaneous—Continued: Page

66 Fed. Reg. (2001):
p. 6436 8
p. 6438 8
pp. 6443-6444 8
H.R. 2202, 104th Cong., 2d Sess. (1996) 37
H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. (1996) 37
H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996) 37
H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 44
H.R. Rep. No. 2478, 85th Cong., 2d Sess. (1958) 5
H.R. Rep. No. 565, 87th Cong., 1st Sess. (1961) 5
H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) 4, 6
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 2, 37
S. 1664, 104th Cong., 2d Sess. (1996) 37
S. Rep. No. 352, 64th Cong., 1st Sess. (1916) 44
S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 44, 45
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 37

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IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

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ON WRIT OF GERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 229 F.3d 406. The opinion of the district court (Pet. App. 74a-91a) is reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals (Pet. App. 94a-95a) and the immigration judge (Pet. App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The petition for a writ of certiorari was filed on November 14, 2000, and was granted on January 12, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to the petition for a writ of certiorari (Pet. App. 98a-114a) are pertinent provisions of

the Suspension of Habeas Corpus Clause of the United States Constitution, Article I, Section 9, Clause 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546; and Section 2241 of Title 28, United States Code.

STATEMENT

1. *Statutory Background.* This case concerns comprehensive amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining judicial review of their deportation orders. See generally H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 107-108, 120-123, 157-161 (1996). Two enactments are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. *Pre-AEDPA Law.* An alien convicted of an "aggravated felony" such as a drug trafficking crime is, and was before AEDPA, "deportable" from the United States. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1251(a)(2)(A)(iii) (1994); 8 U.S.C. 1101(a)(43)(B). Before AEDPA, the Attorney General was authorized to provide

discretionary relief from deportation to aliens lawfully admitted for permanent residence. See 8 U.S.C. 1182(c) (1994).[1] To be eligible for such relief, the alien had to show that he had maintained a lawful unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that that Section's first sentence, which conferred the discretionary authority on the Attorney General, "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

Under the INA as in effect before AEDPA, an alien could challenge a final deportation order, including the Attorney General's denial of discretionary relief from deportation under Section 1182(c), by filing a petition for review of his deportation order in the appropriate regional court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*); *Foti* v. *INS*, 375 U.S. 217 (1963). In addition, under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court,

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[1] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms applied only to permit the admission of certain lawful permanent resident aliens who would otherwise be excludable upon returning to the United States, the Second Circuit held in *Francis* v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country also had to be given the opportunity to apply for relief from deportation under Section 1182(c). In the interest of national uniformity, the Attorney General acquiesced in that decision. See *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

pursuant to 8 U.S.C. 1105a(a)(10) (1994). Similarly, 8 U.S.C. 1105a(b) (1994) permitted judicial review of exclusion orders by way of habeas corpus.

Those provisions for judicial review of deportation and exclusion orders had undergone extensive revision as Congress had sought to balance aliens' opportunities for judicial review with the need to avoid unwarranted delays in deportations. From 1917 to 1952, Congress made no express provision for judicial review of deportation and exclusion orders. This Court ruled that such orders could be reviewed by writ of habeas corpus, but only to the extent that judicial review was required by the Constitution. See *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953).

In the 1950s, however, this Court held that the enactment of the Administrative Procedure Act (APA) in 1946 and of the INA in 1952 had significantly altered the legal landscape, and that Congress had authorized the courts to review the merits of deportation and exclusion orders in actions for declaratory relief brought in district court under the APA. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). In 1961, Congress reacted to those decisions by revising and streamlining the INA's provisions for judicial review. Congress's principal concern was that aliens had resorted "to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). While Congress recognized that aliens should be entitled to challenge "the Government's findings of deportability through judicial process," *ibid.*, Congress's "fundamental purpose * * * was to abbreviate the process of judicial review of deportation orders" in order to prevent "forestalling departure by dilatory tactics in the courts." *Foti*, 375 U.S. at 224.

"The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in

obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals." *Foti*, 375 U.S. at 225. To that end, Congress established a self-contained judicial-review provision in the INA, independent and exclusive of the APA. Congress directed that the Hobbs Act's provisions for review in the courts of appeals "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA, "except" for ten specific qualifications that adapted for immigration cases the Hobbs Act's general provisions with respect to time limits, venue, and other procedural matters. See 8 U.S.C. 1105a(a) (1994) (emphasis added); *Stone* v. *INS*, 514 U.S. 386, 393 (1995).

One of those express exceptions addressed habeas corpus. Congress was aware of the concern that a provision for exclusive review in the courts of appeals would divest the district courts of the authority they had previously exercised to review deportation orders by writ of habeas corpus for the benefit of aliens held in custody.[2] Congress therefore included, among the express exceptions to Section 1105a(a)'s incorporation of the Hobbs Act exclusive court-of-appeals review procedures, a provision that "any alien held in

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[2] For example, at an April 24, 1958, hearing of a subcommittee of the House Judiciary Committee examining the deportation of William Heikkila, Representative Hillings asked whether there is "a possibility that maybe legislatively we could have a procedure whereby all of the possible points of appeal could be consolidated in one case, and all would have to be asserted at one time, otherwise any possible remedy is waived." See No. 85-HJ-T.538, at 21 (Congressional Information Service) (lodged with the Clerk). Representative Walter, in response, expressed doubts that such a provision would be constitutional because it would deny aliens held in custody the opportunity for habeas corpus. *Id.* at 21-22; see also 104 Cong. Rec. 17,172 (1958) (remarks of Rep. Walter); 107 Cong. Rec. 12,177 (1961) (remarks of Rep. Walter); H.R. Rep. No. 2478, 85th Cong., 2d Sess. 6 (1958); H.R. Rep. No. 565, 87th Cong., 1st Sess. 15-16 (1961).

custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994). That provision, the committee report explained, "clearly specifie[d] that the right to habeas corpus [was] preserved to an alien in custody under a deportation order. In that fashion, [Congress] except[ed] habeas corpus from the language which elsewhere declare[d] that the procedure prescribed for judicial review in circuit courts shall be exclusive." H.R. Rep. No. 1086, *supra*, at 29.

b. *AEDPA.* In 1996, Congress twice restricted both the Attorney General's authority to grant discretionary relief from deportation to criminal aliens and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999))).

Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268. AEDPA therefore left in place the exclusive court-of-appeals review provision that Congress had enacted in 1961, but eliminated the INA's previous express "preserv[ation]" (H.R. Rep. No. 1086, *supra*, at 29) of habeas corpus for aliens held in custody. At the same time, Section 440(a) of AEDPA enacted a new Section 1105a(a)(10) to provide, for the same classes of criminal aliens who had been rendered ineligible for relief under Section 1182(c), an exception to the general

availability of judicial review of deportation orders in the courts of appeals. AEDPA Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the restriction enacted in AEDPA Section 440(d) on the Attorney General's authority to grant discretionary relief under 8 U.S.C. 1182(c) (1994) to aggravated felons applied to all deportation proceedings pending on or after the date of AEDPA's enactment, including those pending proceedings in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241. The courts of appeals divided as to whether (as the government contended) AEDPA had deprived the district courts of habeas corpus jurisdiction to entertain such challenges to final deportation orders. The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d). See Pet. 4-5 & nn.3-5.

The government and several aliens filed certiorari petitions, asking this Court to decide whether the district courts retained habeas corpus jurisdiction after AEDPA to entertain challenges to deportation orders, and to resolve the temporal reach of AEDPA Section 440(d). By that time, however, Congress's intervening enactment of IIRIRA had once again recast the legal framework and had reduced the prospective importance of cases arising only under AEDPA. This Court denied the certiorari petitions that involved only the changes to the INA made by AEDPA, remitting to a

later date related issues in cases also involving IIRIRA. See Pet. 6.[3]

c. *IIRIRA.* On September 30, 1996, Congress enacted IIRIRA into law. In Section 304(a) of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders,[4] and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); 110 Stat. 3009-587 to 3009-593.[5] An alien convicted of

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[3] In light of this Court's denial of certiorari in several cases involving the temporal scope of AEDPA Section 440(d) and the remaining conflict in the circuits on that issue, the Attorney General recently published a final rule that, while not conceding their correctness, acquiesced in the decisions of those circuits that concluded that AEDPA Section 440(d) does not bar the Attorney General from granting relief under Section 1182(c) to an alien who had been placed in deportation proceedings before AEDPA was enacted. See 66 Fed. Reg. 6436, 6438 (2001) (promulgating new 8 C.F.R. 3.44). Absent adverse circuit precedent, however, the Attorney General will continue to follow AEDPA Section 440(d)'s restriction on his authority to grant relief under Section 1182(c) in the cases of aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. See *id.* at 6443-6444.

[4] IIRIRA also expressly repealed the old INA provisions setting forth separate procedures for exclusion and deportation of aliens. See IIRIRA § 303(a), 110 Stat. 3009-585 (amending old 8 U.S.C. 1226), and § 308(b)(6), 110 Stat. 3009-615 (striking old 8 U.S.C. 1252b).

[5] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. V 1999), and for aliens not admitted for lawful permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. V 1999). Congress expressly provided for limited habeas corpus review in the district courts of immigration officers' expedited-removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. V 1999). For aliens found subject to removal in Section 1228(b) proceedings, Congress provided a modified version of the general court of appeals judicial-review procedures of 8 U.S.C. 1252 (Supp. V 1999) (discussed at pp. 10-11, *infra*), with shortened time limits. See 8 U.S.C. 1228(b)(3) (Supp. V 1999).

an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999).

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as "cancellation of removal," with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-594 to 3009-596. As under Section 1182(c) as amended by AEDPA, however, Congress provided that the Attorney General may not grant discretionary relief to aliens convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures and the repeal of Section 1182(c) along with its replacement by the new provisions for cancellation of removal—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in old deportation or exclusion proceedings before April 1, 1997, Congress expressly provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by the pre-IIRIRA provisions of the INA (as amended by AEDPA) as well as transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended

by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657 (technical correction).[6]

Congress recast and streamlined the INA's provisions for judicial review of removal orders in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612; see pp. 5-6, *supra*. In its place, Congress enacted the new 8 U.S.C. 1252 (Supp. V 1999), which provides that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress enacted no general exception to that provision for exclusive review of removal orders in the courts of appeals to allow aliens held in custody under a final order of removal to seek habeas corpus relief, as it had done in the INA before AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994). Instead, Congress included, at 8 U.S.C. 1252(e)(2) (Supp. V 1999), only a much narrower exception that permits a limited form of habeas corpus review for aliens arriving at the border without valid documentation who were placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999).

Congress also specifically restricted judicial review of removal orders entered against criminal aliens by providing

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[6] Congress also provided in IIRIRA that aliens subject to exclusion orders in the transition period would no longer have access to the provision of Section 1105a(b) formerly allowing judicial review of their exclusion orders by habeas corpus (see p. 4, *supra*). Instead, Congress provided that "the action for judicial review" of exclusion orders would be governed by the general provisions, including the transition rules, for judicial review of deportation orders in the courts of appeals under Section 1105a(a). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. *Proceedings Below.*

a. Respondent is a native and citizen of Haiti who was admitted to the United States as a lawful permanent resident on June 17, 1986. Pet. App. 2a. On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pleaded guilty to, and was convicted in Connecticut state court for, the sale of a controlled substance, in violation of Conn. Gen. Stat. Ann. § 21a-277(a) (West 1994). Pet. App. 3a. Under the INA, that offense was an aggravated felony. See 8 U.S.C. 1101(a)(43)(B). At the time of respondent's conviction, which was entered before AEDPA amended Section 1182(c) to bar discretionary relief for all aggravated felons, the Attorney General would not have been barred from granting him discretionary relief from deportation under 8 U.S.C. 1182(c) (1994).[7]

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[7] Respondent was sentenced for that drug-trafficking offense to ten years' imprisonment, with execution suspended after five years. See Certified Administrative Record 35. We are informed that, at the time respondent was sentenced, he was already serving a separate term of

In 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based on his drug offense. See Pet. App. 77a. At his hearing before an immigration judge (IJ), respondent sought to apply for relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed as of April 1, 1997 (see p. 9, *supra*). The IJ denied that application and ordered respondent removed. Pet. App. 96a-97a. The Board of Immigration Appeals (BIA) affirmed, concluding that respondent was not eligible for Section 1182(c) relief because that form of relief "is not available in removal proceedings, which the respondent is properly in." *Id.* at 95a.

b. Respondent then filed a petition for a writ of habeas corpus in district court. Respondent contended that, even though the INS had placed him in *removal* proceedings

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imprisonment, which had commenced on August 8, 1995, for another drug-trafficking crime in violation of Conn. Gen. Stat. Ann. § 21a-277(a) (West 1994). Respondent's term of imprisonment for the conviction that formed the basis of his charge of removability was made consecutive to his earlier term and actually commenced on July 3, 1997. On May 13, 1999, respondent was released by state authorities on parole and was transferred to INS custody.

At the time of respondent's conviction, Section 1182(c) barred relief for aliens who had served, for an aggravated felony or aggravated felonies, "a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c) (1994). That bar by its express terms operated to bar relief only when the alien had actually served five years in prison (not including parole time or time in INS detention) for aggravated felony offenses, and not when the alien was merely subject to a potential prison term of five years or more. Respondent has not actually served five years in prison for his drug-trafficking offenses. Accordingly, he would not have been barred from obtaining relief under Section 1182(c), as in effect when he was convicted in March 1996, merely by the length of his prison term. In AEDPA Section 440(d), which was enacted on April 24, 1996, Congress amended Section 1182(c) to render it inapplicable to *all* aggravated felons, regardless of the length of the sentence they served. See pp. 6-7, *supra*.

under the new provisions of IIRIRA (the propriety of which he did not challenge), he remained eligible to be considered for discretionary relief from *deportation* under old Section 1182(c). The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). The district court held that it had jurisdiction, ruled against the government on the merits, and granted habeas corpus, directing the BIA to entertain respondent's application for relief under former Section 1182(c). Pet. App. 74a-91a.

c. The court of appeals affirmed. Pet. App. 1a-39a.

(i) The court first concluded (Pet. App. 5a-6a), based on its decision the same day in *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (2001) (see Pet. App. 40a-73a), that the district court properly exercised jurisdiction over respondent's habeas corpus petition. As in *Calcano*, the court held that IIRIRA did not "divest [the district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available." Pet. App. 6a. Here, the court continued, no other avenue of judicial review is available because respondent had been convicted of an aggravated felony and was therefore barred by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) from raising his claims by petition for review in the court of appeals. Pet. App. 6a; see *id.* at 48a-73a (related holding in *Calcano*).

(ii) On the merits, the court held that the repeal of Section 1182(c) by IIRIRA Section 304 could not be applied to an alien who pleaded guilty or nolo contendere to an aggravated felony before IIRIRA's enactment. Pet. App. 6a-32a.

The court first concluded that Congress had not made clear whether the repeal of Section 1182(c) by IIRIRA Section 304 was to be applied to aliens who were convicted before Section 304's effective date. Pet. App. 14a-22a. It rejected the government's argument that, under the express general "effective date" provision in IIRIRA Section 309(a), 110 Stat. 3009-625, all of the new rules added by Sections 301-308 of IIRIRA, including IIRIRA Section 304's repeal of Section 1182(c) and its substitution of cancellation of removal, must be applied together to aliens placed in removal proceedings on or after April 1, 1997. See Pet. App. 16a.

The court further concluded that applying IIRIRA Section 304's repeal of Section 1182(c) in the cases of aliens who pleaded guilty before IIRIRA was enacted would have "an impermissible retroactive effect." Pet. App. 25a. Focusing on "the decision to enter a guilty plea to a crime * * * that qualifies the alien for removal under the immigration laws," the court agreed with respondent that "an alien charged with a crime making him eligible for deportation would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial," including "the availability of discretionary relief from removal." *Id.* at 26a-27a (brackets and internal quotation marks omitted). Because IIRIRA's repeal of Section 1182(c), in the court's view, would "upset settled expectations were it applied retroactively to pre-enactment guilty pleas [and] * * * would attach new legal consequences to [an alien's] guilty plea to a removal crime," it would "have an impermissible retroactive effect" in such cases. *Ibid.*[8]

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[8] Although the court did not hold that such application would be unconstitutional, it did invoke a perceived need to avoid placing IIRIRA Section 304 in constitutional doubt. Pet. App. 22a n.6. The court acknowledged that the Due Process Clause of the Fifth Amendment places only "a narrow limit on Congress's power" to enact retrospective legislation, but, it stated, retroactive application of IIRIRA Section 304 would raise a

(iii) Judge Walker dissented from the court's ruling on the merits. Pet. App. 33a-39a. Stressing IIRIRA's "comprehensive method of implementation" and Congress's intent that IIRIRA be "a complete break from the past," he concluded that "Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997." *Id.* at 34a-35a. He also concluded that applying IIRIRA's repeal of Section 1182(c) to respondent's case would not conflict with the presumption against retroactivity because Section 304 "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." *Id.* at 39a. And Judge Walker also stated (*ibid.*) that, even if the temporal scope of Section 304 were ambiguous, he would defer to the BIA's construction of it under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in concluding that the district court had authority to review respondent's challenge to his removal order by habeas corpus. That conclusion is contrary to Congress's unmistakable design of the judicial-review provisions of the INA, which is to channel all challenges to removal orders into the courts of appeals (subject to a narrow express exception not implicated in this case). The court of appeals' jurisdictional ruling cannot be reconciled with the streamlined legislative scheme for judicial review of removal orders that Congress has enacted. It also ignores the history underlying congressional efforts to mini-

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"profound constitutional question." *Ibid.* The court remarked that "[t]he Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual" (presumably referring to aliens). *Ibid.*

mize judicial involvement in removal proceedings, including Congress's repeal of a provision of the INA that had previously preserved district court review by habeas corpus of deportation orders for aliens actually held in custody. And the jurisdictional ruling threatens to cause significant delays in the removal of criminal aliens from the United States, despite Congress's manifest desire that removal of criminal aliens be expedited. The decision finds no support in this Court's decisions to the effect that implied repeal of habeas corpus jurisdiction is disfavored, since Congress's divestment of the district courts' authority was express, not implied.

B. The court of appeals further erred insofar as it invoked the concern that, because respondent is barred by another provision of the INA from presenting his claim to the court of appeals, the resulting complete denial of a judicial forum for that claim might constitute an unconstitutional suspension of habeas corpus. The Constitution does not require a judicial forum for respondent's particular non-constitutional claim that he has a right to be considered for discretionary relief from deportation under the law as it existed before Congress amended the INA in 1996. The Court has repeatedly explained that discretionary relief from deportation is a matter of grace and not of right. The Court's immigration decisions arising on habeas corpus also give no indication that this kind of claim is within the constitutional core of the Great Writ. Indeed, Congress has authorized judicial review, even for aggravated felons, of the kinds of claims that the Court has in the past indicated must be made subject to judicial review. And even if the Constitution does require that a forum be available for the kind of claim raised by respondent, that forum should be the court of appeals, given Congress's overarching design of the INA's judicial-review provisions.

II. A. The court of appeals erred in concluding on the merits that an alien who pleaded guilty to an aggravated felony before AEDPA and IIRIRA were enacted but was placed in removal proceedings after IIRIRA's effective date of April 1, 1997, may nonetheless obtain relief from deportation under old 8 U.S.C. 1182(c) (1994), which was repealed by IIRIRA. That decision finds no support in this Court's retroactivity jurisprudence. Congress has expressly provided the temporal scope of IIRIRA's repeal of old Section 1182(c), directing that Section 1182(c) have no application in any removal proceeding commenced after April 1, 1997, regardless of the date of the alien's offense, plea, or conviction. That conclusion is compelled by the structure and design of IIRIRA, which as of April 1, 1997, makes a clear break with the deportation and exclusion proceedings of pre-IIRIRA law and replaces those proceedings with a comprehensive new framework.

B. Given Congress's clear intent that Section 1182(c) should have no application in removal proceedings under IIRIRA, it is unnecessary to consider whether that repeal would have a "retroactive" effect that might implicate the presumption against retroactive application of federal statutes. The court of appeals erred, however, insofar as it concluded that the repeal of Section 1182(c) would have an impermissible retroactive effect in cases like this one. Matters affecting the deportability and relief from deportation of aliens are inherently prospective in nature, and therefore legislative changes in the conditions on which aliens may or may not remain in this country do not implicate any presumption against retroactivity. Nor, since aliens have no right to discretionary relief from deportation, does application of IIRIRA's repeal of Section 1182(c) impair any vested rights. The presumption against retroactivity in any event lends no support to the court of appeals' focus on the class of aliens who pleaded guilty, a group that is not

mentioned in the INA, either before or after its amendment by IIRIRA. Finally, even if the temporal scope of IIRIRA's repeal of Section 1182(c) is not clear, the court of appeals should have deferred to the Attorney General's reasonable conclusion that that repeal should apply to all removal proceedings commenced after April 1, 1997.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE MERITS OF RESPONDENT'S CHALLENGE TO THE FINAL ORDER OF REMOVAL ENTERED AGAINST HIM

A. Congress Has Expressly Provided That Judicial Review Of Final Orders Of Removal Is Available Only On Petition For Review In The Court Of Appeals

The court of appeals ruled in this case, based on its jurisdictional holding in *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (2001) (see Pet. App. 40a-73a), that a criminal alien (like respondent) who is precluded from obtaining judicial review of his removal order in the court of appeals because of 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) may nonetheless obtain such review by filing a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. Pet. App. 6a. That conclusion is incorrect.[9]

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[9] This Court also granted the alien's petition for a writ of certiorari in *Calcano* to consider the related issue whether a court of appeals has jurisdiction, notwithstanding Section 1252(a)(2)(C), to entertain the same challenge to the Attorney General's denial of relief under the former Section 1182(c). Oral argument in both cases has been scheduled for April 24, 2001. Because *Calcano* concerns only the jurisdictional issue whereas this case also presents a challenge to the court of appeals' ruling on the merits, we intend to address the jurisdictional issue further in our brief for the respondent in *Calcano*.

1. The court of appeals' jurisdictional ruling is fundamentally inconsistent with the basic framework for judicial review of removal orders. Since 1961, Congress has consistently prescribed a general requirement that, to prevent delays in deportations, such review must proceed in the courts of appeals. *Foti* v. *INS*, 375 U.S. 217, 224-25 (1963). In enacting Section 1105a in 1961, Congress carved out an express exception to that general rule that allowed aliens actually held in custody under a final order of deportation to obtain judicial review thereof by habeas corpus. See 8 U.S.C. 1105a(a)(10) (1994). But Congress specifically repealed that exception in Section 401(e) of AEDPA, which is entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." 110 Stat. 1268. Congress had enacted old Section 1105a(a)(10)'s express exception to preserve access to habeas corpus for aliens held in custody, recognizing that without such an exception, the self-contained provision in Section 1105a(a) for exclusive review of deportation orders in the courts of appeals under the Hobbs Act would eliminate the district courts' authority to review deportation orders by habeas corpus. See pp. 5-6, *supra*. Thus, when Congress repealed Section 1105a(a)(10) in AEDPA, it divested the district courts of the limited authority they had exercised since the 1961 amendments to review the merits of deportation orders, and made the courts of appeals the exclusive forum for all challenges to deportation orders.

When it enacted the new Section 1252 in IIRIRA, Congress reconfirmed that all judicial review of removal orders must be had in the courts of appeals. Section 1252(a)(1) provides that "[j]udicial review of a final order of removal * * * is governed only by" the Hobbs Act, which channels review of agency orders exclusively into the courts of appeals. See 28 U.S.C. 2341 *et seq.* Congress did not provide any general exception to that exclusive court-of-appeals review provision to allow habeas corpus review at the behest

of aliens held in custody, as it had provided in 1961. Congress did, however, include in Section 1252(a)(1) a narrower exception to the general requirement of exclusive review in the courts of appeals, which is applicable by its terms only to "an order of removal without a hearing pursuant to" 8 U.S.C. 1225(b)(1) (Supp. V 1999). For cases covered by that exception (aliens at the border without documentation who are placed in expedited-removal proceedings), Section 1252(e)(2) provides that "[j]udicial review of any determination made under [Section 1225(b)(1)] is available in habeas corpus proceedings." Thus, when Congress wished to provide for judicial review of final removal orders in habeas corpus proceedings in district court, it expressly so provided in Section 1252 itself, and its omission of any provision for habeas corpus review of any other kind of removal order means that such review is barred. Compare *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Furthermore, to ensure that the specified procedures for judicial review in Section 1252 would not be circumvented, Congress enacted Section 1252(b)(9), which provides sweepingly: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252 itself]." Section 1252(b)(9) confirms that, except for the narrow circumstance expressly mentioned in Section 1252(a)(1) where Congress permitted habeas corpus review (see p. 10, *supra*), the court-of-appeals review procedures of Section 1252 are the exclusive ones available to aliens seeking to challenge their removal orders. Indeed, this Court described Section 1252(b)(9) in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999)

(*AADC*), as an "unmistakable 'zipper' clause" that channels judicial review to the courts of appeals. See *id.* at 482 (describing a "zipper" clause as one that says "no judicial review in [removal] cases unless [Section 1252] provides judicial review").

Finally, Congress also restricted, to a considerable degree, judicial review of criminal aliens' removal orders. Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law"—broad language not limited to Section 1252 or even to the INA—"no court shall have jurisdiction to review any final order of removal against" an aggravated felon. The court of appeals' ruling that respondent could obtain review in the district court of his challenge to the final order of removal against him is flatly inconsistent with that ban.

These consistent and successive enactments show that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals, except where Congress has expressly provided otherwise in the governing judicial-review provision of the INA itself. There is no such exception allowing respondent to obtain judicial review of his removal order in habeas corpus proceedings—and indeed Congress, even before it enacted IIRIRA, had repealed the prior provision for habeas corpus review in order to expedite judicial review of deportation orders. Yet the court of appeals' decision leads to the anomalous result that *criminal* aliens may proceed in district courts to test the validity of their removal orders, whereas all other aliens must file petitions for review in the court of appeals, pursuant to the traditional exclusive-review procedures. That result turns Congress's scheme on its head. Given Congress's overarching intent in AEDPA and IIRIRA to expedite the removal of criminal aliens (see p. 2, *supra*), it is inconceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and

delay) of their removal orders than all other aliens. Cf. *Foti*, 375 U.S. at 224 (noting Congress's concern with delays in judicial review of removal orders); *Stone*, 514 U.S. at 399 (similar).[10] Indeed, the court of appeals acknowledged in *Calcano* (Pet. App. 72a) that the government's reading of the INA would "eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review."[11]

2. The court of appeals nevertheless concluded that Congress had not acted with sufficient clarity to divest the district courts of their authority to review the merits of removal orders by habeas corpus. Invoking *Felker* v. *Turpin*,

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[10] As Congress was aware in both 1961 and 1996, aliens proceeding in district court pursuant to 28 U.S.C. 2241 have markedly greater opportunities for delay than those proceeding directly in the courts of appeals. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. V 1999). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. V 1999); *Stone*, 514 U.S. at 393-394. And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

[11] Accord *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) ("Congress clearly meant to streamline judicial review, and it seems perverse to find that the new laws actually *added* a layer of review in the district courts that did not generally exist before."), cert. denied, 526 U.S. 1004 (1999); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1039 (7th Cir. 1998) (rejecting aliens' contention that merits of deportation orders could be reviewed on habeas corpus after AEDPA because, under that construction, "then Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed* by review by the courts of appeals"), cert. denied, 528 U.S. 1153 (2000).

518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), for the proposition that implied repeals of habeas corpus jurisdiction are not favored, the court stated in *Calcano* that it could not "presume" that Congress had divested district courts of their authority to review removal orders given that Congress had not "explicitly mention[ed] the jurisdictional statute [28 U.S.C. 2241] or the general type of jurisdiction by name." Pet. App. 61a; see *id.* at 62a-63a (stressing that IIRIRA "do[es] not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241"). That reasoning is fundamentally flawed.

In the first place, the court erred in its premise that Section 1252 does not mention habeas corpus ("the general type of jurisdiction") by name. Section 1252(e)(2) expressly permits a narrow form of judicial review by "habeas corpus" in expedited-removal proceedings under Section 1225(b)(1), and Section 1252(a)—which prescribes the general rule that judicial review is exclusively to be had in the courts of appeals—specifically refers to that exception. See pp. 8 n.5, 10, *supra*.

In any event, this case does not involve an implied repeal of the district courts' authority to review removal orders, but rather an express withdrawal.[12] The overwhelming conclusion that must be drawn from AEDPA and IIRIRA is that a district court may no longer review by habeas corpus the Attorney General's legal conclusions that underlie a

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[12] Moreover, Congress has not eliminated all authority in the district court to ensure that the removal of an alien is lawful. If, for example, an alien contended that no removal order had ever been entered against him and that the INS's efforts to remove him were therefore without warrant, a district court would have jurisdiction under 28 U.S.C. 2241 to entertain such a contention. Such a challenge would not fall within the scope of the exclusive-review provisions of Section 1252(a), which refer only to review of removal orders, and the district court would retain authority to ensure that the INS's intended removal of the alien was based on such an order.

determination, in a removal order, that a particular alien is subject to removal. In AEDPA Section 401(e)—a provision entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"—Congress expressly repealed the INA's prior exception for habeas corpus review in former 8 U.S.C. 1105a(a)(10) (1994). See p. 6, *supra*. And the exclusive, self-contained structure of judicial review under Section 1252 enacted by IIRIRA—requiring that judicial review of removal orders be governed "only" by the Hobbs Act's procedures for judicial review in the courts of appeals (§ 1252(a)(1)); dictating that judicial review of all legal and factual issues arising in removal proceedings be had "only" under Section 1252 itself (§ 1252(b)(9)); creating an express but very narrow provision for habeas corpus proceedings in limited circumstances inapplicable here (§ 1252(a)(1) and § 1252(e)(2)); and precluding judicial review of aggravated felons' removal orders "[n]otwithstanding any other provision of law" (§ 1252(a)(2)(C))—demonstrates that a removal order such as that entered against respondent may be challenged, if at all, only in the courts of appeals under Section 1252, and not in the district courts under Section 2241.

Neither *Felker* nor *Yerger* holds or even suggests that a statutory provision that categorically bars *all* forms of judicial review other than that expressly provided for is ineffective to bar review on habeas corpus, and that the only way in which Congress can divest the district courts of authority under Section 2241 is by referring to that specific statute or by using the words "habeas corpus" in an enactment. In both *Felker* and *Yerger*, the statute in question simply did not apply at all to this Court's habeas corpus jurisdiction, either explicitly or in categorical terms that necessarily included that jurisdiction. See *Felker*, 518 U.S. at 658-662. Where, as here, there is such a categorical bar, a specific reference to habeas corpus or the statute governing habeas corpus in the district courts is unnecessary and

indeed would be redundant. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435-438 (1989). Because Congress's intent is clear that another statutory scheme provides the exclusive means by which an alien's removal order may be tested, the courts must give effect to that determination and may not invoke their habeas corpus jurisdiction. See *Swain* v. *Pressley*, 430 U.S. 372, 378 (1977).

The court of appeals also reasoned that Section 1252 does not "expressly" supplant district court review of removal orders on habeas corpus because "judicial review" (which Section 1252 plainly does restrict) has long been understood as distinct from "habeas corpus." Thus, it concluded, IIRIRA's restriction of "judicial review" of removal orders to the courts of appeals should not be read to include habeas corpus review. The sharp line the court of appeals perceived between "judicial review" and "habeas corpus" in the immigration context simply does not exist, however. Congress has long used the term "judicial review" to refer to proceedings for review of the merits of deportation, exclusion, and removal orders in district court by habeas corpus, when it deemed such review to be appropriate.

Thus, when Congress in 1961 acted to preserve habeas corpus review for aliens held in custody, it provided that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994) (emphasis added). And Congress showed that its choice of language was not accidental in old Section 1105a(b), also enacted in 1961, which provided the judicial-review scheme for final exclusion orders: "Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter * * * may obtain *judicial review* of such order by habeas corpus proceedings and not

otherwise." 8 U.S.C. 1105a(b) (1994) (emphasis added).[13] In IIRIRA, Congress again used "judicial review" to refer to review of the merits of a removal order by habeas corpus in district court. For certain expedited-removal orders against aliens at the border—*i.e.*, "orders of removal without a hearing pursuant to [Section 1225(b)(1)]"—Congress provided that "*[j]udicial review* * * * is available in habeas corpus proceedings." 8 U.S.C. 1252(e)(2) (Supp. V 1999) (emphasis added). Thus, the court of appeals was wrong to conclude that Congress's exclusive placement of "judicial review" of removal orders in the courts of appeals was irrelevant to the question whether the district courts retain authority to review such orders by habeas corpus.

Finally, even if the general self-contained scheme enacted by Congress in Section 1252 did not make it sufficiently clear that Congress had eliminated review of removal orders in the district courts, Section 1252(a)(2)(C) unmistakably requires the conclusion that an aggravated felon like respondent cannot obtain such review in district court. Under that provision, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal" against an aggravated felon. Two points are salient about Section 1252(a)(2)(C). First, it states that "no court" shall have such jurisdiction, not just that the courts of appeals shall have no such authority. It thus expressly bars the district courts as well as the courts of appeals from reviewing respondent's claim. Second, it bars the courts from exercising "review"—not merely "judicial review"—of

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[13] When Congress rendered 8 U.S.C. 1105a(b) (1994) inapplicable to transition cases under IIRIRA in 1996, it provided that "the action for judicial review" of exclusion orders would be governed by the general provisions for judicial review of deportation orders in Section 1105a(a)—thus confirming its understanding that "judicial review" of an exclusion order, when had in the district court, had previously been by habeas corpus. See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

removal orders against aggravated felons. Congress's sweeping language requires the conclusion that a criminal alien barred from obtaining review of a challenge to his removal order in the court of appeals may not obtain the very same review in district court.

B. Congress's Withdrawal Of District Courts' Authority To Review Removal Orders Does Not Raise Constitutional Concerns About Suspension Of Habeas Corpus

The court of appeals based its jurisdictional ruling in part on a perceived need to avoid a "serious constitutional question" that would supposedly arise under the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) if no court had authority to consider respondent's particular non-constitutional "retroactivity" challenge to his removal order. See Pet. App. 68a. As we have noted (pp. 13, 18, *supra*), the court of appeals concluded in *Calcano* that it could not review the same kind of claim on an alien's direct petition for review. Although we agree with the court of appeals that Section 1252(a)(2)(C) barred it from entertaining respondent's claim by petition for review, we do not agree that the fact that respondent may have no judicial forum for the particular non-constitutional claim raised in this case raises constitutional concerns. The Suspension Clause does not require a judicial forum for the claim that the Attorney General has the discretionary authority to decline to remove an alien who is concededly subject to removal under the INA.

This Court has never ruled that the Great Writ requires a judicial forum for an alien to present the claim that he has a "right" to be considered for an exercise of a power that Congress has placed in the discretion of the Attorney General to dispense with the deportation of an alien. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as "an

act of grace" accorded to his "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.). Furthermore, even if Section 1182(c) were still theoretically applicable in cases like respondent's, there is no question that the Attorney General would have had the authority, in light of Congress's enactment of IIRIRA proscribing for the future the grant of discretionary relief to aggravated felons, to decide as a matter of policy that all aliens who had been convicted of aggravated felonies should not receive relief under former Section 1182(c). See *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 78-79 (1957) (holding that, in denying discretionary relief from deportation, BIA could take into account policies enacted in the INA in 1952, even though proceeding was technically controlled by Immigration Act of 1917).

Thus, the particular claim raised in this case is well removed from the kinds of claims that this Court has indicated in the past had to be made subject to judicial review by habeas corpus when that was the only avenue for judicial review of deportation orders. While the Court has not provided an exhaustive elucidation of the kinds of claims that fall within the core of the Great Writ, it has provided important insights into the nature of the writ in decisions involving the immigration laws before 1952, when that was the only available form of judicial review of deportation orders. During that period, the Court held that the writ could be used to address four kinds of challenges: (1) claims that a person alleged to be an alien was in fact a citizen (and therefore was not subject to INS jurisdiction at all); (2) claims that the alien had been deprived of a fundamentally fair administrative proceeding; (3) claims that the ad-

ministrative officer's finding of deportability was completely without supporting evidence; and (4) claims that the alien's case did not fall within one of the statutory categories providing for deportation. See *Tod* v. *Waldman*, 266 U.S. 113, 118 (1924); *Ng Fung Ho* v. *White*, 259 U.S. 276, 283-284 (1922); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 458 (1920); *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915); *Chin Yow* v. *United States*, 208 U.S. 8, 11-12 (1908). This case does not fall within any of those categories, for respondent concededly is a deportable alien and has made no claim that his deportation proceeding was lacking in due process.[14]

Section 1252, moreover, continues to allow judicial review for all the kinds of claims mentioned above. Although Section 1252(a)(2)(C) bars the courts from exercising jurisdiction over many claims raised by aliens who have been found removable because of aggravated felony convictions, it does not preclude the courts of appeals from examining, on petition for review, whether those conditions for preclusion of

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[14] During that period, this Court did consider the merits of two cases in which an alien proceeding by habeas corpus contended that the Attorney General had improperly denied discretionary relief from deportation even though the alien was statutorily eligible for such relief. See *Hintopoulos*, *supra*; *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). In *Hintopoulos*, the Court denied relief, see 353 U.S. at 77-79, and in *Accardi*, the Court granted relief only because of what it found to be procedural irregularity in the handling of the case, see 347 U.S. at 266-268. The Court did not expressly address the scope of habeas corpus jurisdiction in either case, and it certainly did not suggest that the Constitution required that habeas corpus be available to review the particular nonconstitutional claims in those cases. The government also did not argue in either case that habeas corpus jurisdiction was absent. See Gov't Br. at 13, *Hintopoulos*, *supra* (No. 205); Gov't Br. at 14, *Accardi*, *supra* (No. 366). This Court has never considered itself bound by *sub silentio* assertions of jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1994); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984).

review actually apply. Under well-settled principles governing preclusion-of-review provisions, when the availability of judicial review depends on a particular factual or legal conclusion, a court may determine whether that condition exists. The doctrine that a court has "jurisdiction to determine its jurisdiction," even when to do so requires it to render a decision that bears on the underlying merits, rests on that understanding. See *Land* v. *Dollar*, 330 U.S. 731, 739 (1947). Accordingly, a court of appeals presented with a petition for review by an alien found removable because of an aggravated felony conviction may determine (1) whether the person is an alien; (2) whether the alien is removable; and (3) whether that ground of removal is one which precludes judicial review under the statute. In addition, in light of this Court's jurisprudence directing that Acts of Congress should not be read to preclude review of constitutional claims absent a clear congressional expression to that effect, see *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974), Section 1252(a)(2)(C) need not and should not be read to preclude review of substantial constitutional claims, such as constitutional challenge to the INA itself and claims of fundamental unfairness in a removal proceeding.

That review in the courts of appeals is an "adequate and effective" alternative to habeas corpus. See *Swain*, 430 U.S. at 381. The question of alienage is analogous to what the Court has referred to as "jurisdictional fact[s]" (including questions of alienage and citizenship). *Ng Fung Ho*, 259 U.S. at 284. The determination whether an alien is actually removable permits the courts of appeals to determine whether administrative officers acted within their legal authority in ordering the alien removed. See *ibid*; *Gegiow*, 239 U.S. at 5. And the inquiry whether an alien's removal proceedings comported with basic guarantees of constitutional due process satisfies the Court's admonition that an alien be per-

mitted to obtain judicial enforcement of the guarantee that "[t]he decision must be after a hearing in good faith, however summary." *Kwock Jan Fat*, 253 U.S. at 458.

Finally, even if this Court were to conclude that the Constitution does require a judicial forum for respondent's effort to obtain discretionary relief from removal, it would be far more appropriate to conclude that Section 1252(a)(2)(C) should not be applied to bar that claim in the court of appeals—either as a matter of statutory construction or one of constitutional imperative—than to hold that the district court may entertain that claim under its habeas corpus authority. Such a result would be much more consistent with Congress's unmistakable design in IIRIRA, which is to bar district court review of such removal orders completely, in light of the serious potential for delay of aliens' removal posed by district court proceedings, but to allow at least a very limited review of removal orders, even for aggravated felons, in the courts of appeals. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

Indeed, because Section 1252(a)(1) clearly directs that judicial review of removal orders be had, if anywhere, only in the courts of appeals, it is independently important to accomplishing Congress's purpose of expediting judicial review that all threshold questions concerning the availability of judicial review also be resolved in the courts of appeals, rather than in the district courts in the first instance subject to appeal to the courts of appeals. That conclusion comports with Section 1252(b)(9), which expressly provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory

provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [the INA] shall be available only in judicial review of a final order under this section [1252]." Consistent with that provision, all quesitons concerning the "interpretation" and "application" of the Suspension Clause and Section 1252(a)(2)(C)'s preclusion of review "arising from" any proceeding to remove a criminal alien from the United States should be resolved "only in judicial review of a final order under [Section 1252]," rather than in the district court on habeas corpus, as occurred in this case. Under any permissible reading of the INA, therefore, the district court did not have jurisdiction over respondent's challenge.

II. THE ATTORNEY GENERAL MAY NOT GRANT RELIEF FROM DEPORTATION UNDER FORMER 8 U.S.C. 1182(c) TO ANY ALIEN PLACED IN REMOVAL PROCEEDINGS AFTER APRIL 1, 1997

If this Court nevertheless concludes that the district court properly exercised habeas corpus jurisdiction over respondent's challenge to his removal order, the question then arises whether the court of appeals erred in ruling that IIRIRA's repeal of Section 1182(c) is not to be applied in the case of an alien who, like respondent, pleaded guilty or nolo contendere to an offense before IIRIRA was enacted, even if that alien was placed in removal proceedings after the effective date of IIRIRA. As we now show, that ruling represents a manifestly erroneous application of the analysis in this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). In *Landgraf*, the Court articulated a two-step analysis for determining whether a federal statute is to be applied to cases arising out of facts occurring before the enactment of legislation:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine

> whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the statue would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280. Both steps of the *Landgraf* test require the conclusion that, because of IIRIRA's repeal of Section 1182(c), the Attorney General may not apply that provision in any removal proceeding commenced on or after April 1, 1997.

A. Congress Intended That Relief Under Former Section 1182(c) Not Be Available To Any Alien Placed In Removal Proceedings After April 1, 1997

1. Congress has clearly prescribed that former Section 1182(c) has no application in any removal proceeding commenced on or after April 1, 1997. In Title III-A of IIRIRA, Congress comprehensively revised the relevant provisions of the INA: it eliminated the INA's old "deportation" and "exclusion" proceedings; it created a new "removal" proceeding; it expressly repealed Section 1182(c), which was applicable in old deportation and exclusion proceedings; and it adopted instead a new form of discretionary relief (cancellation of removal) to be applied in new removal proceedings. See pp. 8-10, *supra*. All of those changes are plainly to be taken as a whole, for the new provisions are intended to be applied together. Congress's comprehensive establishment of a new immigration framework shows its intent that, after a transition period, the provisions of the old law should no

longer be applied at all. Cf. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (a provision is repealed if "the later act covers the whole subject of the earlier one and is clearly intended as a substitute").

IIRIRA also established a single "title III-A" effective date for *all* the revisions made by Title III-A. Specifically, Section 309(a) of IIRIRA provides that, with limited exceptions not applicable to this case, Title III-A and the amendments made by that subtitle—which include IIRIRA Section 304's repeal of Section 1182(c)—"shall take effect" on the first day of the first month beginning more than 180 days after the enactment of IIRIRA, or April 1, 1997. See 110 Stat. 3009-625. IIRIRA's effective date thus marks a caesura, after which a new statutory framework is to be applied. The court of appeals' decision, however, creates a hybrid form of proceeding, in which aliens who are concededly properly placed in *removal* proceedings under the new statutory provisions enacted by IIRIRA Title III-A may nonetheless apply for relief from *deportation* under Section 1182(c), despite IIRIRA Section 304's explicit repeal of that form of relief. Congress simply did not fashion any such interweaving of old and new parts of the INA.

Any doubt about the temporal scope of IIRIRA Section 304's repeal of former Section 1182(c) is resolved by the saving provision in IIRIRA Section 309(c)(1), which provides:

> GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—
>
> (A) the amendments made by this subtitle shall not apply, and

> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657.[15] Congress thus focused its attention specifically on the question of which cases would be governed, even after the Title III-A effective date, by the provisions of the INA that were in effect prior to the enactment of IIRIRA. Congress answered that question by providing that, for aliens who were *already* in exclusion or deportation proceedings before that effective date, the amendments made by Title III-A (which include the repeal of Section 1182(c)) "shall not apply," and that such proceedings "shall continue to be conducted without regard to such amendments."[16] The application of "normal rules of construction" of statutes (*Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997)) compels the conclusion that Congress intended

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[15] A technical correction to IIRIRA in Public Law No. 104-302 amended IIRIRA Section 309(c)(1) to provide that the Title III-A amendments would not apply to aliens in administrative proceedings "before" the effective date, rather than aliens in proceedings "as of" the effective date (as IIRIRA had originally provided). The technical correction makes clear that the Title III-A amendments do not apply to aliens whose administrative proceedings were completed before April 1, 1997.

[16] In Section 309(c)(4)(A), Congress expressly provided that certain parts of Title III-A would apply even to administrative and judicial proceedings commenced before April 1, 1997, and in Section 309(c)(2) and (3), Congress authorized the Attorney General to elect to apply Title III-A to additional administrative proceedings. 110 Stat. 3009-626. Congress did not, however, provide anywhere that any parts of IIRIRA Title III-A would *not* apply to any proceedings commenced on or after the Title III-A effective date of April 1, 1997.

the Title III-A amendments, including the repeal of Section 1182(c), to control all other cases.[17]

2. In concluding that Congress had not manifested any intent about the temporal reach of IIRIRA's repeal of Section 1182(c), the court of appeals overlooked the comprehensive nature of the revisions to the INA made by Title III-A of IIRIRA. As Judge Walker observed (Pet. App. 37a), "the entirety of the new IIRIRA applies generally to [respondent]—indeed, if it did not, he would not be subject to removal at all." The Title III-A effective date therefore must be read as governing the entirety of those intertwined provisions, including Section 304's repeal of Section 1182(c).

The court of appeals also erred in ascribing significance to the fact that Congress expressly provided that amendments to the INA made by certain other sections of IIRIRA (principally in Title III-B) were to be applied to past conduct. See Pet. App. 17a-18a. The court concluded that, because Congress thus demonstrated that it "knew how to explicitly make an IIRIRA provision applicable to 'convictions and sentences entered before, on, or after the date of the enactment of the Act,'" the absence of such language in Section 309 indicated that Congress had no intent to do so for the amendments made by Title III-A. *Id.* at 18a (quoting

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[17] In *Landgraf*, the Court declined to ascribe significance to the fact that Congress has specifically provided that certain of the amendments made by the Civil Rights Act of 1991 would not apply to a very narrow set of pending and closed cases. See 511 U.S. at 258-261. The Court found those provisions to be of little weight because, among other things, they involved "comparatively minor and narrow provisions in a long and complex statute." *Id.* at 258. In IIRIRA, however, Congress plainly focused its attention on the issue of transitional cases and specifically identified the set of transitional cases in which the new rules would not apply. Section 309(c) is not a "minor and narrow provision," but rather the key section addressing transition rules for IIRIRA Title III-A.

IIRIRA § 321(b), 110 Stat. 3009-628, and IIRIRA § 322(c), 110 Stat. 3009-629).[18]

The temporal-scope provisions governing specific amendments made by Title III-B cast no doubt on the express terms of Section 309(a) and (c)(1) that specify the temporal applicability of the comprehensive amendments made to the INA by Title III-A. Title III-B addresses subjects that are entirely different from those treated in Title III-A.[19] Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999) ("Because [the sections] address wholly distinct subject matters, the same negative inference does not arise from the silence of [one section].").

Title III-A, for which Congress provided a single express effective-date provision, restructured removal proceedings

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[18] The court of appeals did not, however, conclude that those other provisions of IIRIRA required the negative inference that Congress affirmatively intended that IIRIRA Section 304's repeal of former Section 1182(c) would *not* apply to aliens who had previously been convicted of criminal offenses. The court acknowledged, in fact, that those other provisions "cover distinct subject matters that are too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304." Pet. App. 21a n.5. Rather, it concluded that the other temporal-scope provisions rendered Congress's intent about the temporal reach of IIRIRA Section 304 ambiguous or unclear. *Id.* at 21a n.5, 22a.

[19] The subtitles also have quite different provenances. The substance of Title III-A of IIRIRA was part of H.R. 2202, an immigration bill that passed the House of Representatives on March 21, 1996 (142 Cong. Rec. 5962). Title III-B of H.R. 2202 would have established new procedures for the removal of alien terrorists. See *id.* at 5341-5344; H.R. Rep. No. 469, Pt. 1, *supra*, at 50. Alien-terrorist removal provisions, however, were separately enacted into law in AEDPA. See 110 Stat. 1258-1268; H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 115-116 (1996). Title III-B of IIRIRA as eventually enacted was derived in large part from a separate Senate bill, S. 1664, Part 5 of which dealt with criminal aliens. See S. Rep. No. 249, 104th Cong., 2d Sess. 17-18 (1996); H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 223-226 (1996).

into a streamlined process from commencement through the hearing on the merits, the grant or denial of cancellation of removal, the appeal to the BIA, judicial review, and ultimately to the physical removal of the alien from the United States. Title III-B, on the other hand, enacted miscellaneous minor amendments to the INA dealing mostly with criminal aliens: Section 321 amended the INA's definition of "aggravated felony" (110 Stat. 3009-627 to 3009-628); Section 322 amended the definitions of "conviction" and "term of imprisonment" (110 Stat. 3009-628 to 3009-629); and Section 324 amended the punishment for the crime of illegal reentry (110 Stat. 3009-629).[20] Title III-B has no general effective date, and so Congress addressed the temporal scope of those provisions individually. The manner in which it did so in no way detracts from the distinct and generally applicable effective date provisions governing Title III-A.

Because Congress's intent is clear that IIRIRA's repeal of Section 1182(c) made that form of relief unavailable in any removal proceeding commenced on or after April 1, 1997, the Court need proceed no further: If Congress has expressly prescribed a statute's temporal reach, "there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

B. The Inapplicability Of Section 1182(c) In Removal Proceedings Commenced On Or After April 1, 1997 Does Not Contravene Any Presumption Against Retroactivity

The court of appeals also erred in concluding under the second step of the *Landgraf* analysis that application of IIRIRA's repeal of Section 1182(c) to aliens who pleaded guilty before that repeal would contravene the presumption

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[20] IIRIRA Section 347, also cited by the court of appeals (Pet. App. 17a-18a), was enacted in yet another subtitle, Title III-C, and provides for the removal of aliens who have illegally voted. See 110 Stat. 3009-638 to 3009-639.

against retroactivity. That presumption is not implicated in a situation like this, where Congress has withdrawn from an official (the Attorney General) a discretionary power to grant future relief from the effect of a civil proceeding that regulates an alien's future status and conduct. Moreover, the court of appeals' focus on guilty pleas is particularly inappropriate because it is wholly unconnected to the text or structure of the INA.

1. a. This Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *Landgraf*, 511 U.S. at 269, and that, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations," *id.* at 273. One such "unquestionably proper" application is when the statute regulates conduct in the future, even when that regulation is based on prior events. See *id.* at 293 n.3 (Scalia, J., concurring in the judgment) (noting that "the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions").

Removal proceedings present a clear example of such a situation, for a new statute may be applied to make an alien deportable, or to eliminate his eligibility for relief from deportation, without contravening any presumption against retroactivity. This Court has long characterized deportation proceedings as inherently prospective, in that they concern the alien's right to remain in this country in the future. As the Court explained in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), "[t]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." Similarly, in *AADC*, the Court emphasized that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation*

of United States law." 525 U.S. at 491; see also *Ng Fung Ho*, 259 U.S. at 280 ("Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful.").

The inherently prospective nature of Congress's specification of the grounds on which an alien may be deported or denied relief from deportation is supported by the fact that such specifications are exercises of Congress's plenary power, rooted in the Nation's sovereignty, to determine which aliens are welcome here and which are not.[21] Aliens have no entitlement to remain in the United States beyond that specifically granted to them by Congress.[22] Accord-

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[21] See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952) ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotations omitted); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) ("[N]or is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."); *Kaloudis*, 180 F.2d at 490 ("The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate.").

[22] That is not to say that Congress could not expressly provide that an alien had a right to remain here, such that a subsequent statute should not be construed to impair that right. For example, in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), which the Court discussed in *Landgraf* (see 511 U.S. at 271-272), the Court ruled that a statute barring Chinese nationals from reentering the United States without a certificate prepared when they left this country should not be applied to a Chinese national who had left the United States before the act was passed. At that time, a

ingly, when Congress provides for the deportation of a particular class of aliens, it is, "in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their *continued presence* here would not make for the safety or welfare of society." *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) (emphasis added).[23] The regulation of aliens' "continued presence" here does not contravene any presumption against retroactivity.

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treaty between the United States and China gave Chinese nationals "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right." 112 U.S. at 539. Crucial to the Court's decision was the conclusion that application of the new statute to an alien who had previously left the country would retroactively impair the "rights previously vested" in him. See *id.* at 559. The unusual facts of *Chew Heong* have no application to this case, which involves the more typical situation of the removal of an alien who is unquestionably removable because of his conviction of an aggravated felony. The application of a new rule barring the Attorney General from granting discretionary relief from removal impairs no "rights previously vested," because no alien has a vested right to discretionary relief from removal.

[23] For the same reason, the court of appeals' concern (see Pet. App. 22a n.6) that IIRIRA's repeal of Section 1182(c) must be construed to avoid constitutional doubts is ill-founded. This Court has made clear on numerous occasions that Congress's power to alter the bases on which an alien may be deported is not constrained by the Constitution's limitations on retroactive lawmaking. See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (upholding deportation under 1952 INA of alien convicted in 1938 of marijuana violation); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (upholding application of 1950 statute requiring deportation of anyone who had ever been a member of the Communist Party after entering the United States to an alien who had been a Communist only before the statute's enactment); *Harisiades*, 342 U.S. at 593-596 (similarly upholding application of 1940 statute requiring deportation of any person who had been a member of the Communist Party, even in the past); *Mahler*, 264 U.S. at 34, 39 (upholding deportation under 1920 statute of alien convicted in 1918 under the Espionage Act).

b. IIRIRA's repeal of the Attorney General's authority to grant relief under Section 1182(c) may also be understood as the repeal of a provision that would authorize prospective relief, which also does not implicate the presumption against retroactivity. See *Landgraf*, 511 U.S. at 273-274; *Miller* v. *French*, 120 S. Ct. 2246, 2257 (2000). A grant of relief under former Section 1182(c), as well as a grant of cancellation of removal today, is in effect a determination by the Attorney General that a finding that the alien is removable should not be given future effect, in light of all the information available to the Attorney General at that particular time.[24] Such a determination must be made "at the time of the hearing." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921).

The Attorney General's decision to grant relief from deportation also is similar in character to the entry of an injunctive order prohibiting the INS from carrying out a finding of deportability. As such, Congress's curtailment of the Attorney General's authority to grant such relief resembles a statute curtailing a court's authority to grant prospective injunctive relief. This Court has made clear that such a statute must be applied to pending cases, even if the request for injunctive relief arises out of conduct in the past. See *Duplex*, 254 U.S. at 464; *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921). Just as a complainant in equity has "no vested right in [an

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[24] Although the determination of removability is usually made in the same proceeding as the decision whether an alien is entitled to discretionary relief (see *Foti*, 375 U.S. at 223-225), the two matters are logically separate, and as a matter of administrative practice, immigration judges and the BIA do not pretermit the question whether an alien is removable even when they are persuaded that the alien is entitled to discretionary relief from removal. See also 8 C.F.R. 240.12(a) (requiring that IJ's order include a finding whether the alien is inadmissible or deportable).

injunctive decree] while it was subject to [appellate] review," *ibid.*, so an alien in deportation or removal proceedings has no vested right in the continued availability of a form of discretionary relief that would prevent the INS from carrying out in the future a deportation order based on a finding of deportability.

2. More generally, IIRIRA's repeal of Section 1182(c) was not retroactive because it was directed at the Attorney General's power to grant an alien discretionary relief from deportation, and was not directed at the alien's underlying conduct that gave rise to his deportation in the first place or any supposed right of an alien to obtain or apply for discretionary relief. As we have noted, the Court has explained on several occasions that the Attorney General's grant of discretionary relief from deportation or removal is an act of grace accorded to his unfettered discretion. See pp. 27-28, *supra*. The language of Section 1182(c) confirms that understanding. Section 1182(c) provided that certain lawful permanent resident aliens "may be admitted in the discretion of the Attorney General" without regard to various provisions of Section 1182(a) that render an alien excludable and therefore require the Attorney General to deny admission to such an alien. See 8 U.S.C. 1182(a) (1994) (describing categories of aliens "who are ineligible to receive visas and who shall be excluded from admission into the United States"). In addition, Section 1182(c) denied the Attorney General the power to admit certain lawful permanent resident aliens—such as those excludable on grounds of security and terrorist activity, see 8 U.S.C. 1182(c) (first sentence) (1994) (referring to 8 U.S.C. 1182(a)(3) (1994)), and some or all aggravated felons, see 8 U.S.C. 1182(c) (third sentence) (1994) (before and after amendment by AEDPA § 440(d), 110 Stat. 1277).

The background and legislative history of Section 1182(c) similarly show that Congress fashioned that provision as a

grant of discretionary power, not a right to relief for the alien. The predecessor to Section 1182(c), the Seventh Proviso to Section 3 of the Immigration Act of 1917 (1917 Act), ch. 29, 39 Stat. 878, was enacted in response to this Court's decision in *Lapina* v. *Williams*, 232 U.S. 78 (1914), which held that a statutory ground for exclusion required denial of admission to an alien who was returning to a domicile in the United States after a trip abroad, even though he would not have been deportable had he not left the United States. In the 1917 Act, Congress provided that, notwithstanding mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence "may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." 39 Stat. 878; see 8 U.S.C. 136(p) (1925).[25] The Senate Report described the proviso's intent as the "humane" one to "permit the readmission to the United States (under proper safeguards) of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship." S. Rep. No. 352, 64th Cong., 1st Sess. 6 (1916).

When Congress comprehensively reexamined the Nation's immigration laws in the early 1950s, it concluded that the discretionary power under the Seventh Proviso had been abused, and that the authority to waive grounds of inadmissibility should be further restricted to cases involving lawful permanent resident aliens. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952); S. Rep. No. 1515, 81st Cong., 2d Sess. 382-383 (1950). Noting that under then-current law the Attorney General was "empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had

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[25] The Secretary of Labor's authority was transferred to the Attorney General in 1939. See Reorganization Plan No. V, 54 Stat. 1238.

never been lawfully admitted to the United States," the Senate Report concluded that "any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations." *Ibid.* Congress therefore enacted Section 1182(c) in substantially the form which it took for 30 years. Absent from the legislative history of Section 1182(c) or its predecessor is any indication that Congress intended therein to create a "right" in the alien to be considered for relief from deportation.

The fact that Section 1182(c) created a restricted power in the Attorney General rather than a right in the alien demonstrates that IIRIRA's repeal of Section 1182(c) was not retroactive under the Court's understanding of that concept in *Landgraf.* The Court there referred to Justice Story's definition of a "retrospective" law as one that "takes away or impairs vested rights * * * , imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." 511 U.S. at 269 (quoting *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). Congress never granted aliens any "vested right" in the form of relief authorized under Section 1182(c), because that form of relief was discretionary. The repeal also did not impose a "new duty" on respondent to leave the United States, as respondent was deportable well before IIRIRA was enacted. And IIRIRA's repeal of Section 1182(c) also did not attach any new disablility "in respect to transactions or considerations already past," because, as we have explained, the grounds for removability and availability of discretionary relief set forth in the INA regulate the alien's *future* right to remain in the United States.

3. The court of appeals' retroactivity analysis is wrong for an additional reason: its determination that the applicability of IIRIRA's repeal of Section 1182(c) should turn on whether the alien had *pleaded guilty* before that Section's repeal has no connection whatever to the statute (either IIRIRA or the INA more generally). The court of appeals believed (Pet. App. 24a-26a) that applying the repeal to aliens who had pleaded guilty would have a "retroactive effect" because those aliens might have entered their guilty pleas in reliance on the state of the law at the time, which permitted them at least to be considered for relief under Section 1182(c); thus, it concluded, the repeal of Section 1182(c) unsettled their expectations that they might obtain such relief (*id.* at 27a-29a). But the presumption against retroactivity explicated in *Landgraf* does not direct or authorize the courts to range at large to determine whether past expectations of some kind might be adversely affected by the application of a new law. Rather, since retroactivity is fundamentally a matter of statutory construction,[26] the pertinent question is whether the past consequence of some primary activity directly regulated by the statute is so adversely changed that it is appropriate to presume that Congress would not have intended that the new law apply. Thus, for example, in *Landgraf*, the Court concluded that provisions enacted in the Civil Rights Act of 1991 permitting a complaining party to obtain compensatory and punitive damages for acts of employment discrimination were retroactive because they increased employers' potential liability for discriminatory acts, the precise conduct addressed by

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[26] Cf. *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 858 n.3 (1990) (Scalia, J., concurring) (noting that "[t]he application of the presumption, like the presumption itself, seeks to ascertain the probable legislative intent").

both the original (1964) and amended (1991) versions of the Civil Rights Act. 511 U.S. at 281-283.

It does not follow that a particular application of a new statute has retroactive effect within the meaning of this Court's cases merely because its operation entails an adverse consequence as a result of some past activity, when that activity is not itself the basis of regulation under the statute. Thus, the court of appeals erred in concluding that the repeal of Section 1182(c) would be "retroactive" as applied to respondent's entry of his guilty plea, because guilty pleas as such are not the basis of anyone's removal under the INA. The INA does provide in many circumstances that an alien will be deportable if he is *convicted* of an offense, see 8 U.S.C. 1227(a)(2) (Supp. V 1999), and in fewer circumstances that an alien will be removable if he has *committed* an offense (whether or not convicted), see 8 U.S.C. 1227(a)(4)(A) (Supp. V 1999), but it makes no distinctions at all based on whether an alien has pleaded guilty or not guilty. There is therefore no basis in the statute for distinguishing, as the court of appeals did, between aliens who pleaded guilty and those who did not, in determining whether the repeal of Section 1182(c) would contravene the presumption against retroactivity. See Pet. App. 25a-26a, 31a.[27]

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[27] The court of appeals' focus on guilty pleas suggests that, notwithstanding its assertion that its ruling was based on the statute and not the Constitution (see Pet. App. 22a n.6), the court in effect concluded that IIRIRA's repeal of Section 1182(c) would be unconstitutional as applied to aliens who, like respondent, had previously pleaded guilty (but not aliens who had been convicted after a trial). But as we have noted, such a ruling would run counter to decades of decisions of this Court concluding that Congress may apply new statutory grounds for deportation based on past conduct without running afoul of constitutional constraints. See p. 41 n.23, *supra*; see also *Brady* v. *United States*, 397 U.S. 742, 756-757

4. Finally, even if it were not sufficiently clear under the first and second steps of the *Landgraf* analysis that Congress had intended that Section 1182(c) be inapplicable in any new removal proceeding commenced under IIRIRA, the courts should defer to the BIA's construction of IIRIRA's provision repealing Section 1182(c). If Congress has left a gap in IIRIRA's revision of the INA, then under standard principles of administrative law, that gap is for the Attorney General (or here, his delegate, the BIA) to fill, and the courts may not set aside his determination unless it is arbitrary, capricious, or contrary to law. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Deference is particularly appropriate to the Attorney General's interpretation of IIRIRA in light of his particular statutory charge in 8 U.S.C. 1103(a)(1) (Supp. V 1999) to issue controlling determinations of "all questions of law" arising in the administration of the immigration laws. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). It is also supported by weighty considerations of administrative practicality. Immigration judges and the BIA should not be required to follow two sets of rules in removal proceedings involving aliens who entered guilty pleas before IIRIRA—one set derived from the Attorney General's unquestioned authority to place an alien such as respondent in removal proceedings (rather than deportation proceedings), and another derived from the continued operation of a form of relief (Section 1182(c)) that applies only to deportation (but not removal) proceedings.

Adherence here to the rule of deference to the Attorney General's reasonable construction of a provision of the INA that he administers does not conflict with the presumption against retroactivity articulated in the second step of the

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(1970) (discussed at Gov't Reply Br. in Support of Pet. for Cert. at 9-10 n.8).

Landgraf analysis, even though both principles apply when Congress's intent about the temporal applicability of a federal statute is not clear. The provisions of the Civil Rights Act of 1991 that this Court concluded in *Landgraf* should not be applied retroactively were amendments to the Civil Rights Act of 1964 authorizing damages in civil actions. Those damages provisions are administered by the courts, not a federal agency, and so the courts did not owe deference to the agency's construction of those provisions. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990).

Landgraf did not address the circumstance in which a federal agency must ascertain the scope of its authority to administer a provision as affected by a new law enacted by Congress. That determination is very similar to the function frequently undertaken by federal agencies when they must determine the subject-matter scope of their jurisdiction. The courts defer to agencies' reasonable construction of their subject-matter jurisdiction or limits on their authority. See *CFTC* v. *Schor*, 478 U.S. 833, 844-845 (1986); see also *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases). In similar fashion, the courts should defer to the Attorney General's reasonable conclusion that he does not have authority to apply Section 1182(c) in removal proceedings commenced after April 1, 1997.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the Board of Immigration Appeals properly concluded that respondent is not eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective, even though he pleaded guilty and was convicted before that date.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. RESPONDENT'S RETROACTIVITY CLAIM MAY BE RAISED IN A SECTION 2241 HABEAS ACTION IN THE ABSENCE OF PETITION-FOR-REVIEW JURISDICTION 8

A. The 1996 Amendments Do Not Contain The Requisite Express Directive To Repeal Section 2241 Under *Felker* and *Ex Parte Yerger* 10

B. AEDPA Did Not Eliminate Section 2241 Habeas Jurisdiction 12

C. IIRIRA Did Not Eliminate Section 2241 Habeas Jurisdiction 16

II. THE NEW PROHIBITION ON RELIEF DOES NOT APPLY TO PRE-ENACTMENT EVENTS .. 19

A. Congress Did Not Provide Expressly For The New Bars To Relief To Apply To Legal Permanent Residents With Pre-Act Convictions 22

TABLE OF CONTENTS – Continued

Page

B. Changing The Possibility Of Deportation Into Mandatory Deportation Is A New Legal Consequence 34

C. There Is No Deportation Exception To The Presumption Against Retroactivity 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Hardy, 478 U.S. 255 (1986) 39

Arias-Agramonte v. INS, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000), *appeal pending*, No. 00-2595 (2d Cir.) 20, 21, 22, 23, 33

Barber v. Gonzales, 347 U.S. 637 (1954).....31, 35

Beazell v. Ohio, 269 U.S. 167 (1925) 42

Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) 18

Buscemi, Matter of, 20 I. & N. Dec. 191 (BIA 1990) 4

Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir.), *cert. granted*, 121 S. Ct. 849 (2001) 1, 6, 8

Cannon v. Univ. of Chicago, 441 U.S. 667 (1979) 16

Carter v. United States, 530 U.S. 255 (2000)..... 15

Chamorro-Torres v. INS, 520 U.S. 1103 (1997) 19

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 48, 49

Chew Heong v. United States, 112 U.S. 536 (1884) 45, 46, 47

Chow v. INS, 113 F.3d 659 (7th Cir. 1997)..... 18

Collins v. Youngblood, 497 U.S. 37 (1990) 42

Costello v. INS, 376 U.S. 120 (1964)..... 33, 36, 37, 41

C-V-T-, In re, Int. Dec. No. 3342, 1998 WL 151434 (BIA 1998) 5, 32

Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981) 16

TABLE OF AUTHORITIES – Continued

Page

De Veau v. Braisted, 363 U.S. 144 (1960)..... 42

EEOC v. Arabian-American Oil Co., 499 U.S. 244 (1991)..... 48

Eastern Enters. v. Apfel, 524 U.S. 498 (1998)..... 20

Edwards, Matter of, 10 I. & N. Dec. 506 (BIA 1964)..... 4

Felker v. Turpin, 518 U.S. 651 (1996)....7, 10, 11, 12, 18

Fiswick v. United States, 329 U.S. 211 (1946)..... 36

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)..... 35

Fong Yue Ting v. United States, 149 U.S. 698 (1893).... 47

Foti v. INS, 375 U.S. 217 (1963)..... 12

Francis v. INS, 532 F.2d 268 (2d Cir. 1976)..... 32

Galaviz-Medina v. Wooten, 27 F.3d 487 (10th Cir. 1994)..... 16

Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999)..... 4, 10, 49

Gordon, Matter of, 20 I. & N. Dec. 52 (BIA 1989)...3, 44

Grant v. Zemski, 54 F. Supp. 2d 437 (E.D. Pa. 1999).... 21

Hamilton Murray v. Gibson, 56 U.S. 421 (1853)....35, 45

Harisiades v. Shaughnessy, 342 U.S. 580 (1952)..... 47

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).....33, 49

Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996)..... 18

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 33, 48

Jideonwo v. INS, 224 F.3d 692 (7th Cir. 2000)..38, 39, 48

Jordan v. De George, 341 U.S. 223 (1951) 37

Jurado-Gutierrez v. Greene, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000).....23, 49

K-, Matter of, 1 I. & N. Dec. 79 (BIA 1941)..... 4

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 20

Katsoulis v. INS, 522 U.S. 1027 (1997)..... 19

Kessler v. Strecker, 307 U.S. 22 (1939) 47

Kolster v. INS, 101 F.3d 785 (1st Cir. 1996)..... 18

L-, Matter of, 1 I. & N. Dec. 1 (BIA 1940) 3

Landgraf v. USI Film Prods., 511 U.S. 244 (1994).. *passim*

Landon v. Plasencia, 459 U.S. 21 (1982).....35, 45, 46

Lehmann v. INS, 353 U.S. 685 (1957)..... 47

Lehmann v. United States ex rel. Carson, 353 U.S. 685 (1957) 48

Lindh v. Murphy, 521 U.S. 320 (1997) 20, 23, 27, 30

Lindsey v. Washington, 301 U.S. 397 (1937) 42, 43

Lok, Matter of, 18 I. & N. Dec. 101 (BIA 1981)..... 45

Louis Vuitton v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985) 41

Luria v. United States, 231 U.S. 9 (1913)..... 46

M- Matter of, 5 I. & N. Dec. 598 (BIA 1954)..... 4

TABLE OF AUTHORITIES – Continued

Page

Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999) 23

Mahadeo v. Reno, 226 F.3d 3 (1st Cir. 2000), *pet. for cert. filed*, No. 00-962 21

Mahler v. Eby, 264 U.S. 32 (1924)..... 47

Mansour v. INS, 123 F.3d 423 (6th Cir. 1997)..... 18

Marin, Matter of, 16 I. & N. Dec. 581 (BIA 1978) ...3, 4

Martin v. Hadix, 527 U.S. 343 (1999)..... *passim*

Massachusetts v. United States Dep't of Transp., 93 F.3d 890 (D.C. Cir. 1996)..... 49

Mattis v. Reno, 212 F.3d 31 (1st Cir. 2000) 23

Miller v. Florida, 482 U.S. 423 (1987)..... 42

Miller v. French, 530 U.S. 327 (2000)..... 44

Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999) 33

NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 48

Ng Fung Ho v. White, 259 U.S. 276 (1922) 46

Orozco v. United States INS, 911 F.2d 539 (11th Cir. 1990)..... 16

Pena-Rosario v. Reno, 83 F. Supp. 2d 349 (E.D.N.Y. 2000)..... 21

Pension Benefit Guar. Corp. v. Gray, 467 U.S. 717 (1984) 48

TABLE OF AUTHORITIES – Continued

Page

Przygocki, Matter of, 17 I. & N. Dec. 361 (BIA 1980) 44

Qasguargis v. INS, 519 U.S. 1148 (1997) 19

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 31

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) 17

Requena-Rodriguez v. Pasquarell, 190 F.3d 299 (5th Cir. 1999) 23

Reverdes v. Reno, 95 F. Supp. 2d 22 (D. Mass. 2000) 38

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 20, 31, 35, 37, 41

Roberts, Matter of, 20 I. & N. Dec. 294 (BIA 1991) 4

Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997) 18

Santos-Gonzalez v. Reno, 93 F. Supp. 2d 286 (E.D.N.Y. 2000) 21

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 23

Shwab v. Doyle, 258 U.S. 529 (1922) 23

Silva, In re, 16 I. & N. Dec. 26 (BIA 1976) 32

Slusser v. Commodity Futures Trading Comm'n, 210 F.3d 783 (7th Cir. 2000) 40

Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.N.H. 1814) 34, 35, 45

TABLE OF AUTHORITIES – Continued

Page

Sotelo Mondragon v. Ilchert, 653 F.2d 1254 (9th Cir. 1980) 16

Tam v. Reno, No. 98-C2835, 1999 WL 163055 (N.D. Cal. Mar. 22, 1999), *rev'd on other grounds*, 2001 WL 30677 (9th Cir. 2001) 38

Tasios v. Reno, 204 F.3d 544 (4th Cir. 2000) 23, 38, 41, 43

Thompson v. Reno, No. 99-C5551, 2000 WL 361675 (E.D. Pa. Apr. 5, 2000) 21

Twenty Per Cent Cases, 87 U.S. (20 Wall.) 179 (1873) 28

United States ex rel. Marcello v. District Director, 634 F.2d 964 (5th Cir. 1981) 16

United States v. Carlton, 512 U.S. 26 (1994) 21

United States v. Graham, 169 F.3d 787 (3d Cir. 1999) 20

United States v. Heth, 7 U.S. (3 Cranch) 399 (1806) 46

United States v. Holguin-Enriquez, 120 F. Supp. 2d 969 (D. Kan. 2000) 21

United States v. Jung Ah Lung, 124 U.S. 621 (1888) 46, 47

United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928) 28

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 23

United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000) 20

United States v. Williams, 514 U.S. 527 (1995) 23

TABLE OF AUTHORITIES – Continued

Page

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 45

Velasquez v. Reno, 37 F. Supp. 2d 663 (D.N.J. 1999) 21, 33, 36

Wallace v. Reno, 24 F. Supp. 2d 104 (D. Mass. 1998), *aff'd*, 194 F.3d 279 (1st Cir. 1999) 32

Weaver v. Graham, 450 U.S. 24 (1981) 42, 43

Williams v. INS, 114 F.3d 82 (5th Cir. 1997) 18

Yerger, Ex Parte, 75 U.S. (8 Wall.) 85 (1868) ... 10, 11, 18

Zalawadia v. Reno, No. 99-C1837 (W.D. La. 1999), *pet. for cert. pending*, No. 00-268 21

STATUTES AND REGULATIONS:

Act of May 10, 1920, ch. 174, § 2, 41 Stat. 593 47

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... *passim*

§ 401(e), 110 Stat. 1268 ..... 13, 15

§ 440(d), 110 Stat. 1277 ..... 4, 23

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 ..... *passim*

§ 105(b), 110 Stat. 3009-556 26

§ 212(e), 110 Stat. 3009-571 26

§ 301(b)(3), 110 Stat. 3009-578 28

§ 301(c)(2), 110 Stat. 3009-579 28

TABLE OF AUTHORITIES – Continued

Page

§ 306(d), 110 Stat. 3009-612 28

§ 304, 110 Stat. 3009-587 ..... 24, 30

§ 304(a), 110 Stat. 3009-587 ..... 24, 29, 30

§ 304(b), 110 Stat. 3009-597 ..... *passim*

§ 306(b), 110 Stat. 3009-612 12

§ 309, 110 Stat. 3009-625 29

§ 309(a), 110 Stat. 3009-625 ..... 28, 29

§ 309(b), 110 Stat. 3009-625 29

§ 309(c), 110 Stat. 3009-625 29

§ 309(c)(1), 110 Stat. 3009-625 ..... 29, 30

§ 309(c)(5), 110 Stat. 3009-627 26

§ 309(c)(7), 110 Stat. 3009-627 26

§ 321(b), 110 Stat. 3009-628 24-25

§ 321(c), 110 Stat. 3009-628 ..... 24, 25, 27

§ 322(c), 110 Stat. 3009-629 ..... 24, 25, 27

§ 341(c), 110 Stat. 3009-636 26

§ 342(b), 110 Stat. 3009-636 25

§ 344(c), 110 Stat. 3009-637 25

§ 347(c), 110 Stat. 3009-639 25

§ 348(b), 110 Stat. 3009-639 25

§ 350(b), 110 Stat. 3009-640 25-26

§ 351(c), 110 Stat. 3009-640 26

TABLE OF AUTHORITIES – Continued

Page

§ 352(b), 110 Stat. 3009-641 26

§ 376(c), 110 Stat. 3009-649..... 26

§ 379(b), 110 Stat. 3009-650 26

§ 380(c), 110 Stat. 3009-650..... 26

§ 381(b), 110 Stat. 3009-650 26

§ 382(c), 110 Stat. 3009-651..... 26

§ 383(b), 110 Stat. 3009-652 26

§ 384(d)(2), 110 Stat. 3009-653..... 26

§ 412(e), 110 Stat. 3009-668 26

§ 421(b), 110 Stat. 3009-670 26

§ 503(b), 110 Stat. 3009-671 26

§ 505(b), 110 Stat. 3009-672 26

§ 531(b), 110 Stat. 3009-625 26

§ 551(c), 110 Stat. 3009-679..... 26

§ 562(e), 110 Stat. 3009-683 26

§ 604(c), 110 Stat. 3009-694..... 26

Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 *et seq.*..... 3

8 U.S.C. 1101(a)(43)(M) (Supp. V 1999)..... 40

8 U.S.C. 1105a (1994) 12

8 U.S.C. 1105a(a) (1994)..... 13

8 U.S.C. 1105a(a)(10) (1994) 12, 13, 14, 15, 16

8 U.S.C. 1182(c) (1994)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. 1182(h) (Supp. V 1999) 25

8 U.S.C. 1227 (Supp. V 1999) 31-32

8 U.S.C. 1227(c) (Supp. V 1999) 32

8 U.S.C. 1229b (Supp. V 1999) 24

8 U.S.C. 1229b(a) (Supp. V 1999) 5

8 U.S.C. 1251 (1994) 32

8 U.S.C. 1252 (Supp. V 1999) 2, 12

8 U.S.C. 1252(a)(1) (Supp. V 1999) 16

8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) 8-9, 16, 19

8 U.S.C. 1252(b)(9) (Supp. V 1999) 16, 17, 19

8 U.S.C. 1252(e)(2) (Supp. V 1999) 18

28 U.S.C. 1254(1) 1

28 U.S.C. 2241 ..... *passim*

28 U.S.C. 2244(b)(3)(E) 11

31 U.S.C. 3730(b) 41

Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874:
Seventh Proviso, 39 Stat. 878 3

Cal. Pen. Code § 1016.5 (West 1985) 39

Conn. Gen. Stat. § 54-1j (1994 & Supp. 2000) 39

D.C. Code Ann. § 16-713 (1997 & Supp. 2000) 39

Fla. R. Crim. P. 3.172(c)(8) (1999) 39

TABLE OF AUTHORITIES – Continued

Page

Haw. Rev. Stat. Ann. § 802E-2 (Michie 1999) 39

Mass. Gen. Laws Ann. ch. 278, § 29D (1992 & Supp. 2000) 39

Mont. Code Ann. § 46-12-210(f) (1997) 39

N.Y. Crim. Proc. Law § 220.50(7) (McKinney Supp. 1999) 39

Ohio Rev. Code Ann. § 2943.031 (Banks-Baldwin 1997) 39

Or. Rev. Stat. § 135.385(2)(d) (1997) 39

Tex. Crim. Proc. Code Ann. § 26.13(a)(4) (West 1989) 39

Wash. Rev. Code Ann. § 10.40.200 (West 1990) 39

Wis. Stat. Ann. § 971.08(1)(c) (West 1998) 39

8 C.F.R.:

Section 1.1(p) 45

Section 212.3 3

OTHER AUTHORITIES:

104 Cong. Rec. 8,632 (1958) 14

104 Cong. Rec. 12,726 (July 6, 1959) 13, 15

104 Cong. Rec. 13,104 (1958) 14

104 Cong. Rec. 17,172 (Aug. 12, 1958) 14

104 Cong. Rec. 17,173 (Aug. 12, 1958) 13

TABLE OF AUTHORITIES – Continued

Page

104 Cong. Rec. 17,175 (Aug. 12, 1958) 14

H.R. 2703, 104th Cong., Title VI, Subtitle A, § 601 *et seq.* 15

H.R. 2703, 104th Cong., Title VI, Subtitle E, § 661 *et seq.* 15

H.R. Rep. No. 2478, 85th Cong., 2d Sess. (Aug. 6, 1958) 13, 14

1A J. Sutherland, *Statutory Construction* § 18.07 (5th ed. 1993) 15

Sup. Ct. R. 14.1(a) 23

Sentencing Guidelines for United States Courts, 66 Fed. Reg. 7962 (Jan. 26, 2001) 21

OPINIONS BELOW

The court of appeals opinion, 229 F.3d 406, is reproduced at Pet. App. 1a. The related court of appeals opinion in *Calcano-Martinez v. INS*, 232 F.3d 328, is reproduced at Pet. App. 40a. The opinion of the district court, Pet. App. 74a-91a, is reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals, Pet. App. 94a-95a, and the immigration judge, Pet. App. 96a-97a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The petition for a writ of certiorari was filed on November 14, 2000, and was granted on January 12, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are identified in the Brief for the Petitioner ("Pet. Br.") 1-2 and are set forth at Pet. App. 98a-114a.

INTRODUCTION

This case concerns a new statute governing the deportation of legal permanent residents based on criminal convictions. The jurisdictional issue is whether any court can review the pure question of law presented here. The merits issue is whether legislation enacted in 1996 that eliminated discretionary relief for certain legal residents and compelled their deportation applies retroactively to alter the legal consequences of events that occurred before the change in law.

Prior to 1996, legal permanent residents with seven years residence in the United States who committed a deportable offense were statutorily eligible to apply for a waiver of deportation, provided that they did not actually serve five years in prison for an "aggravated felony" conviction. The decision whether to grant a waiver was made by an immigration judge ("IJ") before a final deportation order was

issued and was based on a balancing of equitable considerations, both positive and negative. In 1996, Congress imposed a new restriction on eligibility for deportation relief by barring relief for all aliens convicted of an "aggravated felony" regardless of the length of time (if any) of imprisonment. As a result, those legal residents who were eligible for relief under prior law because they had served fewer than five years in prison are now effectively subject to mandatory deportation under the new law.

While Congress may have broad constitutional power to impose new restrictions on deportation relief, including new restrictions governing conduct and events that pre-date the change in law, that is not the issue in this case. Rather, the question is whether Congress unambiguously expressed an intent to reach pre-enactment events. If it did not, the new provision does not apply retroactively to impose new disabilities or legal consequences as a result of the law's change.

There is good reason for Congress to have distinguished between prospective and retroactive application of the new statute. The prospective elimination of deportation relief applies to recent misconduct that Congress has concluded warrants mandatory deportation. Retroactive elimination of relief, by contrast, applies to immigrants whose misconduct may have occurred years before the law changed or who made decisions in their criminal cases, including whether and how to plead, without any warning that those decisions would effectively lead to mandatory deportation. The 1996 laws do not contain any express manifestation that Congress intended that result.

STATEMENT

1. *Jurisdiction.* The jurisdictional questions raised here and in the companion case, *Calcano-Martinez v. INS*, No. 00-1011, are whether any court has jurisdiction to resolve the statutory retroactivity issue respondent raises, and whether the proper mechanism for review of that claim is a district court habeas corpus action under 28 U.S.C. 2241 or a court of appeals petition-for-review proceeding under 8 U.S.C. 1252.

2. *Section 1182(c).* a. The immigration statutes have long included waiver provisions for immigrants with substantial equities. The early version of the waiver at issue here was the Seventh Proviso of the Immigration Act of 1917, 39 Stat. 874, 878. Relief under the Seventh Proviso was available to any alien with seven years of unrelinquished domicile in the United States. The provision at issue here, 8 U.S.C. 1182(c) (1994), appeared in 1952 when Congress enacted the current Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 *et seq.*

The Section 1182(c) waiver determination is made before entry of a deportation order. Deportation proceedings are commenced when the Immigration and Naturalization Service ("INS") charges a person with deportability. At the immigration hearing, the first question is whether the individual is in fact a deportable alien based on one of the grounds enumerated in the INA. That question may be contested or conceded. If alienage and deportability are established, the IJ turns to whether the alien qualifies for relief from deportation. That adjudication is required and encompasses both whether the alien is eligible and, if eligible, whether relief should be granted. *See* 8 C.F.R. 212.3 (directing that the IJ "shall adjudicate" an application for relief under Section 1182(c) made during a deportation or exclusion proceeding); *Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (stating that each application for relief "must be judged on its own merits").

If granted, Section 1182(c) gives full relief and causes termination of the immigration proceedings. The permanent resident retains his legal permanent resident status and is not subject to deportation based on the criminal conviction that caused the INS to initiate proceedings. *See Matter of Gordon*, 20 I. & N. Dec. 52 (BIA 1989). The Section 1182(c) adjudication is based on established equitable factors guided by sixty years of BIA precedent. *See Marin*, 16 I. & N. Dec. at 584-85 (reviewing BIA precedents and listing factors to be considered); *Matter of L-*, 1 I. & N. Dec. 1, 7 (BIA 1940). The factors that the IJ is required to consider in a waiver hearing include: family ties; residence of long duration (especially

when residence began at a young age); evidence of hardship to the respondent and family if deportation occurs; service in this country's Armed Forces; a history of employment; the existence of property or business ties; evidence of value and service to the community; proof of genuine rehabilitation; and other evidence attesting to a respondent's good character. *See Marin*, 16 I. & N. Dec. at 584-85.[1] In the years prior to 1996, relief under Section 1182(c) was awarded in approximately half of all cases. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (citing Department of Justice statistics), *cert. denied*, 526 U.S. 1004 (1999).

b. Before 1996, the statutory eligibility criteria for relief under Section 1182(c) precluded relief for immigrants who were convicted of an "aggravated felony" and who actually served five years in prison for that crime. In 1996, Congress enacted a new bar to relief by providing that any aggravated felony conviction eliminated eligibility for relief regardless of the length (if any) of imprisonment. Initially, Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended

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[1] *See also Matter of Roberts*, 20 I. & N. Dec. 294, 301 (BIA 1991) (upholding denial of relief in light of absence of evidence of genuine rehabilitation and seriousness of conviction); *Matter of Edwards*, 10 I. & N. Dec. 506 (BIA 1964) (ordering relief under Section 1182(c), despite evidence that his family would be self-supporting and two larceny convictions, for 54-year-old man who immigrated at the age of 7, had served in the armed forces, and who had lived under the good-faith but erroneous belief that he was a citizen); *Matter of M-*, 5 I. & N. Dec. 598 (BIA 1954) (ordering award of Section 1182(c) relief to 68-year-old man with legal resident wife, citizen children, and unblemished record since conviction in 1923 for which he served four years in prison); *Matter of K-*, 1 I. & N. Dec. 79 (BIA 1941) (perjury in naturalization proceedings outweighed by thirteen years of clear record and equitable factor of dependent citizen wife). The Board has cautioned that an IJ must examine all of the positive and negative factors in deciding whether to award relief. *See Matter of Buscemi*, 20 I. & N. Dec. 191 (BIA 1990).

former Section 1182(c) to impose this *per se* "aggravated felony" bar to eligibility. Then, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, retained the *per se* bar when it recodified and replaced Section 1182(c) with a provision called "cancellation of removal." That replacement provision now appears at 8 U.S.C. 1229b(a). A "cancellation of removal" adjudication considers the same equitable factors as Section 1182(c) relief and is governed by the same BIA precedent. *In re C-V-T-*, Int. Dec. No. 3342, 1998 WL 151434 (BIA 1998). The "cancellation" statute carries forward the prohibition enacted by AEDPA and provides that immigrants who are deportable based on any aggravated felony are barred from applying for relief, regardless of the term of imprisonment (if any) actually served.

3. Enrico St. Cyr was admitted to the United States on June 17, 1986 as a lawful permanent resident. Pet. App. 2a. His parents and sister are citizens of the United States, and his brother is a lawful permanent resident. Pet. App. 2a.

On March 8, 1996, Mr. St. Cyr was convicted based on a guilty plea to the sale of a controlled substance. Under the then-governing immigration statute, the conviction subjected Mr. St. Cyr to deportation, which was not mandatory because he was eligible to seek a waiver under Section 1182(c). On April 10, 1997, the INS commenced removal proceedings against Mr. St. Cyr on the basis of his conviction. Pet. App. 3a. When Mr. St. Cyr sought to apply for relief under Section 1182(c), the IJ ruled that he had been rendered statutorily ineligible on the ground that he had been placed into immigration proceedings after IIRIRA's effective date, April 1, 1997. Pet. App. 95a. The IJ issued an order of removal, and the BIA affirmed on the same ground.[2]

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[2] In response to respondent's argument that he was eligible for relief under Section 1182(c), the BIA simply stated: "We disagree as section [1182(c)] relief is not available in removal proceedings, which [Mr. St. Cyr] is properly in. Section [1182(c)]

Mr. St. Cyr filed a habeas corpus petition in district court challenging the BIA's legal ruling that he was statutorily ineligible to apply for relief under Section 1182(c). The district court held that it had jurisdiction to hear respondent's claim under 28 U.S.C. 2241 and, on the merits, held that he remained eligible to apply for relief under the immigration law that governed when he pled guilty. Pet. App. 82a, 87a.

The court of appeals affirmed. The court unanimously held, based on its simultaneously-issued decision in *Calcano-Martinez v. INS*, that the district court properly exercised jurisdiction over Mr. St. Cyr's claims. Pet. App. 6a. A majority of the panel further held that depriving him of the opportunity to apply for relief under the law that governed when he pled guilty constituted a retroactive application of the new legislation under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

The court of appeals first held that neither AEDPA nor IIRIRA contained express language demonstrating that Congress intended to eliminate eligibility for relief for those, like Mr. St. Cyr, who pled guilty to a disqualifying criminal offense before the enactment of AEDPA and IIRIRA. Pet. App. 16a-17a. The court therefore proceeded to determine whether the statutes had an impermissible retroactive effect. The court noted that legal residents who are charged with a crime "carefully consider[] the immigration consequences of . . . [a] conviction and, specifically, the availability of discretionary relief from removal." Pet. App. 27a-28a. It recognized that defense attorneys have a professional obligation to consider immigration consequences in advising an immigrant defendant about the consequences of a plea. It further observed that a resident alien is part of a community and

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was repealed by section 304(b) of [IIRIRA], and was replaced with cancellation of removal under Section 240A[.]" Pet. App. 95a.

"is likely aware of what happens to other members of the community who engage in criminal conduct." Pet. App. 28a. The court recognized that preserving the right to remain in the United States might be the most important factor in a plea negotiation. The court of appeals held that under the new statute "settled expectation[s] [are] upset dramatically," Pet. App. 29a, because eliminating the possibility of relief "alter[s] the substantive rights of aliens subject to removal proceedings," Pet. App. 30a, and "eradicates a form of relief previously available," *id.* Therefore, the court of appeals concluded, the change in law "attach[es] new legal consequences" to pre-enactment pleas and hence has "an impermissible retroactive effect." *Id.* Judge Walker joined the majority on the jurisdictional ruling but dissented on the merits.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that, in the absence of petition-for-review jurisdiction, respondent's pure question of law was reviewable in the district court under 28 U.S.C. 2241. Neither the statutes themselves (nor the legislative history) contain the express directive that is required to effectuate a repeal of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651 (1996).

2. The presumption against retroactive statutes is one of the bedrock principles of the rule of law. Two years before the enactment of the laws at issue here, the Court reaffirmed that a statute will not be applied retroactively absent an unambiguous directive from Congress. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). That requirement serves to ensure that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268.

First, with regard to this statute, Congress did not provide an unambiguous directive regarding the temporal scope of the new statutory provision. IIRIRA contains a number of express temporal provisions, but none

addresses the provision governing eligibility for Section 1182(c) relief. The government seeks authorization for retroactive application from an effective date provision. But *Landgraf* expressly rejected reliance on such provisions. The government also argues for a retroactive scope by drawing an inference from other provisions, but retroactivity cannot be inferred.

Second, application of the new statute has a retroactive effect. The prior opportunity to seek a waiver of deportation – to present one's individual equities and have a decision made on the basis of these equities – is eliminated. As such, for many longtime lawful permanent residents, the statute transforms the possibility of deportation into a certainty based on acts or events that predate the change in law. Retroactive application therefore deprives permanent residents of notice and upsets their settled expectations and reasonable reliance.

Third, the government's suggestion that retroactivity concerns play no role in the immigration setting is contradicted by this Court's decisions. Such a suggestion conflates the constitutional power of Congress to enact retroactive legislation with the question of whether Congress has in fact legislated with the requisite specificity to achieve retroactive application.

ARGUMENT

I. RESPONDENT'S RETROACTIVITY CLAIM MAY BE RAISED IN A SECTION 2241 HABEAS ACTION IN THE ABSENCE OF PETITION-FOR-REVIEW JURISDICTION.

The court of appeals held, on the basis of its companion decision in *Calcano*, that 8 U.S.C. 1252(a)(2)(C)[3] eliminated its own petition-for-review jurisdiction over all

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[3] Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is

claims challenging an alien's eligibility for a waiver of deportation, but that neither Section 1252(a)(2)(C) nor any other provision of the 1996 amendments bars access to 28 U.S.C. 2241 habeas jurisdiction over "pure legal" claims. Pet. App. 73a; *see generally id.* at 68a-73a. The government maintains that the Second Circuit erred and argues that the 1996 amendments vest the courts of appeals with exclusive jurisdiction over final orders. The government further maintains that, contrary to the Second Circuit's construction of the statute, Section 1252(a)(2)(C) should not be read to bar aliens from raising substantial constitutional claims in the courts of appeals. The government argues, however, that the 1996 amendments preclude all judicial scrutiny of statutory claims challenging an alien's eligibility for a waiver and that such complete preclusion of judicial scrutiny raises no constitutional concerns.

To avoid repetition with the briefing in *Calcano*, this brief addresses only certain of the government's arguments. The *Calcano* petitioners, who filed both petitions for review and Section 2241 habeas actions, have addressed three questions: (i) whether the bar on the circuit courts' petition-for-review jurisdiction can be construed to permit review in the court of appeals over the types of statutory and constitutional claims raised here and in *Calcano* (*Calcano* Pets. Br. 17-26, 42-44), (ii) whether Section 2241 jurisdiction is available if petition-for-review jurisdiction is barred over these claims (*id.* at 44-49), and (iii) whether the 1996 amendments are unconstitutional if they preclude review in *any* forum over such statutory and constitutional claims (*id.* at 26-42). Respondent will not address the first and third arguments, because they are fully set forth in *Calcano* and because the respondent here filed only a Section 2241 habeas action. This brief will respond only to the government's contention that the 1996 amendments bar

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removable by reason of having committed a criminal offense covered in [various sections of the Immigration Act]."

Section 2241 habeas jurisdiction and, where appropriate, will also reference the briefing in *Calcano* on that issue.[4]

A. The 1996 Amendments Do Not Contain The Requisite Express Directive To Repeal Section 2241 Under *Felker* and *Ex Parte Yerger.*

The government maintains that AEDPA's and IIRIRA's amendments were intended to eliminate Section 2241 jurisdiction over final deportation orders (Pet. Br. 18-19) and that IIRIRA's amendments "reconfirmed" that result (*id.* at 19). As the court of appeals noted, however, none of the amendments made by either AEDPA or IIRIRA expressly mentions Section 2241. Accordingly, under this Court's decisions in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Second Circuit properly refused to find that the 1996 amendments eliminated access to Section 2241. *See* Pet. App. 48a-62a (*Calcano* opinion).

Nor does the legislative history of AEDPA and IIRIRA mention Section 2241, or in any way show that Congress focused on the issue of barring access to Section 2241 where no other review would be available over a pure question of law. There is likewise nothing in either Act's history indicating that Congress was aware of the constitutional issues that

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[4] Unlike the *Calcano* petitioners, respondent filed only a Section 2241 district court habeas action. If this Court were to hold that the types of claims raised by respondent may be reviewed – but only in the courts of appeals by petition for review – respondent respectfully requests that his case be remanded to allow the Second Circuit to determine in the first instance whether individuals in respondent's situation may now (1) file a late petition for review, or (2) pursue their Section 2241 actions based on the circuit law that governed at the time they filed. Among other factors, the courts of appeals would have to consider the fairness of penalizing individuals whose decision to file only a district court habeas action was consistent with circuit precedent. *See, e.g., Goncalves v. Reno*, 144 F.3d 110, 116 n.5 (1st Cir. 1998) (noting reliance issue), *cert. denied*, 526 U.S. 1004 (1999).

would be triggered by the total repeal of all review over a question of law or that Congress made the decision to force the courts to confront those delicate constitutional questions.

The government seeks to distinguish *Felker* and *Ex Parte Yerger* on the ground that the statutes in those cases "did not apply at all to this Court's habeas jurisdiction, either explicitly or in categorical terms that necessarily included that jurisdiction." Pet. Br. 24. The government thus argues that those decisions do not prevent the repeal of Section 2241 by a preclusion statute that applies generally. Accordingly, the government contends that the 1996 amendments are sufficient to preclude Section 2241 jurisdiction because they contain a categorical ban on judicial review for aliens deportable on the basis of certain criminal offenses. Yet, nothing in *Felker* or *Ex Parte Yerger* suggests that this Court intended to limit those decisions in such a manner. The point of *Felker* and *Ex Parte Yerger* (and clear statement rules in general) is precisely that they force Congress to legislate explicitly and specifically to eliminate all doubt about whether a general enactment was intended to have a particular effect. Here, the elimination of Section 2241 would necessarily be "by implication" (*Ex Parte Yerger*, 75 U.S. at 105), since none of the 1996 amendments mentions Section 2241.[5]

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[5] In any event, *Felker did* involve a preclusion statute that applied in categorical terms to the type of review sought by the petitioner in that case. The petition filed directly in this Court in *Felker* was denominated an "original" petition in habeas parlance, but it did not fall within the Court's original jurisdiction and was reviewable only under this Court's *appellate jurisdiction*. Consequently, the preclusion language, which stated that an unmeritorious habeas action "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," 28 U.S.C. 2244(b)(3)(E), plainly applied to the petitioner's habeas petition; indeed, the language stating that unmeritorious habeas actions "shall not be appealable" would have been entirely superfluous if it did not cover "original" writs filed directly in this Court. Thus, if the government were correct that Section 2241 review may be

B. AEDPA Did Not Eliminate Section 2241 Habeas Jurisdiction.

The government places substantial emphasis on the role of AEDPA. However, even apart from the *Felker* express statement rule, the government has not demonstrated that in AEDPA Congress made a decision to bar all avenues of review, including Section 2241. As an initial matter, AEDPA's amendments have no independent force here. AEDPA amended the INA's former judicial review scheme, but IIRIRA repealed that scheme altogether (along with AEDPA's amendments) and replaced it with a new scheme (codified at 8 U.S.C. 1252 *et seq.*). *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing old judicial review scheme in 8 U.S.C. 1105a *et seq.*). The new scheme created by IIRIRA now governs cases, like respondent's, where immigration proceedings commenced after April 1, 1997. *Calcano* Pets. Br. 15.

In any event, even if AEDPA were still controlling, its amendments did not bar access to Section 2241.[6] The government bases its reading of AEDPA's amendments in significant part on its understanding of the relationship between AEDPA and enactment of 8 U.S.C. 1105a in 1961. The government acknowledges that the 1961 amendments eliminated only district court actions for declaratory and injunctive relief under the Administrative Procedure Act, and not habeas jurisdiction. *See* Pet. Br. at 4-6, 19; *Foti v. INS*, 375 U.S. 217, 231 (1963). The government contends, however, that the 1961 amendments preserved habeas jurisdiction over final orders *only* because they contained an explicit provision for habeas jurisdiction in Section 1105a(a)(10), which according to the government acted as an exception to the general

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barred by a categorical ban that fails to mention Section 2241, the statute in *Felker* would have been sufficient. Yet the Court held that it was not sufficiently explicit because it nowhere specifically mentioned Section 2241. *Felker*, 518 U.S. at 661.

[6] In addition to the Second Circuit, nine other circuits have also held that AEDPA's amendments did not repeal Section 2241. *See Calcano* Pets. Br. 4 n.3 (citing circuit case law).

provision in Section 1105a(a) vesting the courts of appeals with "sole and exclusive" jurisdiction over final orders. Based on this premise, the government contends that when AEDPA § 401(e), 110 Stat. 1268, subsequently repealed Section 1105a(a)(10), Congress thereby eliminated all habeas jurisdiction, including under Section 2241, and left the courts of appeals with sole and exclusive jurisdiction.

The government's argument hinges on demonstrating both that the 1961 amendments would have eliminated Section 2241 in the absence of the specific INA habeas provision in former Section 1105a(a)(10) and that the AEDPA Congress, acting 35 years later, intended to bar access to Section 2241 when it repealed that former INA habeas provision. The government has made neither showing.

The 1961 Act's "sole and exclusive" provision in former Section 1105a(a) nowhere mentions Section 2241 (or even habeas jurisdiction generally). Nor does the legislative history demonstrate that the 1961 Congress believed that the Act would have barred habeas jurisdiction in the absence of Section 1105a(a)(10). From the beginning, the focus of the 1961 amendments was *not* on eliminating habeas jurisdiction but rather on the fact that the 1952 Immigration Act had given aliens the right to bring APA "lawsuits" in district court for declaratory and injunctive relief. The goal of the 1961 amendments was to eliminate these APA lawsuits, and indeed, the drafters consistently stated that the amendments were never intended to eliminate habeas corpus: "Nothing contained in the bill is, or can be, designed to prevent an alien from obtaining review by habeas corpus." 104 Cong. Rec. 12,726 (July 6, 1959) (statement of Rep. Walter, chief sponsor). *See also* 104 Cong. Rec. 17,173 (Aug. 12, 1958) (statement of Rep. Walter) (noting that habeas corpus was an "expeditious" means of review and stating that courts would be "relieved of a great burden" once declaratory actions were eliminated); H.R. Rep. No. 2478, 85th Cong., 2d Sess. 9 (Aug. 6, 1958) ("[H]abeas corpus is a far more expeditious judicial remedy than that of declaratory judgment.").

Given the focus on eliminating APA declaratory and injunctive lawsuits, nothing in the history of the 1961 Act

suggests that the drafters intended for the "sole and exclusive" language to do anything more than eliminate an alien's right to bring such district court suits. The express habeas provision in Section 1105a(a)(10) appears to have been added simply out of an abundance of caution to assuage those who expressed concerns about the constitutionality of eliminating habeas corpus. *See* 104 Cong. Rec. 17,172, 17,175 (Aug. 12, 1958).[7] The only point that emerges from the 1961

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[7] The government's legislative history citations, Pet. Br. 5 n.2, 6, do not show that the "sole and exclusive" language was intended to eliminate habeas jurisdiction. Representative Walter first proposed his bill, along with its "sole and exclusive" language, in May 1958. *See* 104 Cong. Rec. 8,632 (1958). At that time, the bill did not contain the express habeas provision of 1105a(a)(10), which was only added after Judiciary Committee consideration. *See* H.R. Rep. No. 2478, 85th Cong., 2d Sess. No. 2 (1958) (describing amendment). The government cites Representative Walter's statement that habeas review could not constitutionally be foreclosed in support of its claim that the "sole and exclusive" language would have eliminated habeas jurisdiction absent Section 1105a(a)(10), Pet. Br. 5 n.2 (citing subcommittee hearing). However, the statement on which the government relies was made *before* Representative Walter proposed enactment of the *first* version of his bill, which included the "sole and exclusive" language but not the express habeas provision later added by the Judiciary Committee. *See* 104 Cong. Rec. 8,632 (1958) (introducing first version of his bill); 104 Cong. Rec. 13,104 (1958) (introducing second version). Thus, given his view that habeas had to be preserved, he likely believed that the bill he proposed – with the sole and exclusive language but not the habeas provision – nonetheless preserved habeas jurisdiction.

As further support for its position, the government also quotes a portion of the Committee Report saying that habeas jurisdiction was preserved as an exception to the courts of appeals' otherwise exclusive jurisdiction. Pet. Br. 6. However, that quotation is equally consistent with respondent's view that the habeas provision was merely declarative of the drafters' understanding that the sole and exclusive language was never

amendments is that Congress's focus was on eliminating APA actions and that Congress did not intend to eliminate habeas corpus.

The intent of the AEDPA Congress is similarly unclear. AEDPA § 401(e), the provision which repealed the former INA habeas provision in Section 1105a(a)(10), specifically mentions only Section 1105a(a)(10) and contains no reference to Section 2241. The government contends, however, that the title of the provision should be taken as evidence that Congress was seeking to eliminate *all* habeas review, and thus, that Section 2241 is no longer available. Pet. Br. 19, 24. Yet the title of a provision cannot enlarge its meaning and AEDPA § 401(e) specifically repeals only former Section 1105a(a)(10). *See* 1A J. Sutherland, *Statutory Construction* § 18.07 (5th ed. 1993); *Carter v. United States*, 530 U.S. 255, 267 (2000) (statute does not encompass robbery despite inclusion of "robbery" in title, because provision's text did not mention robbery).[8]

Moreover, Congress had ample reason to want to eliminate the former INA habeas provision in Section 1105a(a)(10), wholly unrelated to any desire to take the unprecedented step of eliminating access to the independent grant of habeas jurisdiction in Section 2241. In particular, the courts had struggled to make sense of the overlapping and

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intended to foreclose habeas jurisdiction because "[n]othing contained in the bill is, or can be, designed to prevent an alien from obtaining review by habeas corpus." 104 Cong. Rec. 12,726 (July 6, 1959) (statement of Rep. Walter).

[8] The origin of AEDPA § 401(e) casts further doubt on the government's position because the provision originated in the House as part of a series of provisions specifically related to removing alien terrorists. *See* H.R. 2703, 104th Cong., Title VI, Subtitle A, § 601 *et seq.* (1996). Provisions relating generally to deportation procedures, and specifically to judicial review of criminal aliens' deportation orders, were in a separate subtitle of the bill. *See* H.R. 2703, 104th Cong., Title VI, Subtitle E, § 661 *et seq.* (1996). Nor does anything in AEDPA's legislative history explain the purpose of AEDPA § 401(e)'s repeal of the habeas provision in Section 1105a(a)(10).

confusing provisions in the 1961 Act. Congress may thus have hoped to eliminate the confusion by repealing Section 1105a(a)(10), leaving only the traditional and narrow scope of habeas jurisdiction under Section 2241. *See Cannon v. Univ. of Chicago*, 441 U.S. 667, 694 (1979) (presuming congressional awareness of lower court decisions).[9]

C. IIRIRA Did Not Eliminate Section 2241 Habeas Jurisdiction.

The government argues that IIRIRA "reconfirmed" that the district courts lack Section 2241 habeas jurisdiction to review legal claims challenging a final order. Pet. Br. 19. But as the court of appeals correctly found, and as the *Calcano* brief addresses, the IIRIRA provisions on which the government relies do not specifically address the question of the availability of Section 2241 habeas jurisdiction where no other avenue of review is available for pure legal claims. *See Calcano* Pets. Br. 46-49 (discussing 8 U.S.C. 1252(a)(1), (b)(9), (a)(2)(C)). Although IIRIRA generally channels review to the courts of appeals, and thereby divests the district courts of APA-type jurisdiction, it does not explicitly eliminate Section 2241 jurisdiction.

The government places reliance on 8 U.S.C. 1252(b)(9) and the Court's reference to that provision as a "zipper"

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[9] For example, some courts had assumed that habeas jurisdiction existed under *both* Section 2241 and Section 1105a(a)(10), thereby creating an unnecessary redundancy. *See Orozco v. U.S. INS*, 911 F.2d 539 (11th Cir. 1990); *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254 (9th Cir. 1980). Courts also struggled over the scope of habeas jurisdiction and the circumstances under which it could be invoked. *See, e.g., Galaviz-Medina v. Wooten*, 27 F.3d 487 (10th Cir. 1994); *Daneshvar v. Chauvin*, 644 F.2d 1248 (8th Cir. 1981); *United States ex rel. Marcello v. District Director*, 634 F.2d 964 (5th Cir. 1981).

clause in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"). Pet. Br. 20, 24.[10] That reference, however, was made with respect to the scope of Section 1252(b)(9)'s *coverage – i.e.*, the type of determinations to which it applied. *See Calcano* Pets. Br. 46 & n.17 (discussing Section 1252(b)(9)). The Court stated in *AADC* that Section 1252(b)(9) channels review of a wide range of immigration actions to the courts of appeals. But the Court did not comment on the analytically distinct question of whether Section 1252(b)(9) repealed Section 2241 habeas jurisdiction in cases where there was no review in the court of appeals. 525 U.S. at 480 n.7 (leaving open habeas issue).

The Court's reference to Section 1252(b)(9) as a "zipper clause" is best understood in historical context. As the Court noted in *AADC*, the 1961 amendments had been construed to channel review of final orders of deportation to the courts of appeals, but to allow the district courts to exercise traditional jurisdiction over other types of claims that were viewed as being outside of a "final order." 525 U.S. at 485. Section 1252(b)(9) now ensures that review of these other claims will be channeled to the courts of appeals as part of the review of the final order. That change, however, has no significance for the issue in this case. No court has disputed that review of final orders is generally channeled to the courts of appeals where such review is available; indeed, even under the 1961 Act, review of final orders was channeled to the courts of appeals. The issue here is whether the Court should find a repeal of Section 2241 in the absence of an express directive if no other avenue of review is available over a final order.

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[10] Section 1252(b)(9) provides: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section."

The government also notes that one of the provisions added by IIRIRA – 8 U.S.C. 1252(e)(2) – provides for habeas jurisdiction for a limited class of aliens (those arriving at ports of entry) and argues that this limited habeas provision creates a negative inference that habeas jurisdiction is foreclosed for all other aliens. Pet. Br. 20, 23. But under the *Felker/Ex Parte Yerger* rule, the Court has not permitted Section 2241 to be repealed by inference. The grant of habeas jurisdiction to one group cannot be the basis for finding a repeal with respect to another group.

Finally, respondent notes that the government's contention that the 1996 amendments unequivocally placed all review over final orders in the circuits is at odds with the position it initially advanced. When AEDPA went into effect in April 1996, immigrants did not initially seek district court habeas review, but instead sought to preserve review in the courts of appeals by petitions for review, arguing that the 1996 amendments were unconstitutional if they divested the courts of jurisdiction to review legal claims. The courts of appeals nonetheless dismissed the petitions for review and avoided the constitutional questions that would be raised by a complete preclusion of review by either expressly acknowledging the availability of habeas jurisdiction or leaving open that possibility.[11]

During this early litigation, the government did not consistently take the position that it advances here – that the 1996 amendments cannot plausibly be read to preserve Section 2241 habeas review. In this Court, for example, when immigrants sought review of the dismissal of their petitions for review and argued that the Suspension Clause guaranteed review over their deportation orders, the government opposed certiorari and stated that the Suspension Clause

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[11] *See, e.g., Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997); *Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997); *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997).

question was not properly presented because the alien "ha[d] not sought a writ of habeas corpus." Brief for the Respondent [INS] in Opposition at 9, *Qasguargis v. INS* (No. 96-806), *cert. denied*, 519 U.S. 1148 (1997).[12] In contrast, the government now states that any review required by the Suspension Clause should be provided only in the courts of appeals by petition for review "either as a matter of statutory construction or one of constitutional imperative," Pet. Br. 31, and that "all questions concerning the 'interpretation' and 'application' of the Suspension Clause and Section 1252(a)(2)(C)'s preclusion of review" must be raised by petition for review, *id.* at 31 (quoting 8 U.S.C. 1252(b)(9)).

In sum, nothing in the 1996 amendments supplies the type of unequivocal evidence required to repeal Section 2241 where no other commensurate avenue of review is available to test an administrative deprivation of liberty. The overarching fact is that Congress did not focus on Section 2241: the text and legislative history of the 1996 amendments do not mention Section 2241, and in marked contrast to the 1961 Congress, the AEDPA and IIRIRA Congresses did not give any attention to the constitutionality of a statute that would eliminate access to habeas corpus for aliens facing deportation. Under these circumstances, the Court should not presume that Congress intended to abrogate the minimal level of habeas review consistently available since Congress first began regulating immigration at the turn of the twentieth century.

II. THE NEW PROHIBITION ON RELIEF DOES NOT APPLY TO PRE-ENACTMENT EVENTS.

Just two years prior to the enactment of AEDPA and IIRIRA, this Court reaffirmed Congress's duty to mandate the temporal scope of a new statute if it intends the law

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[12] *See also* Brief for the [INS] at 15, *Chamorro-Torres v. INS* (No. 96-985), *cert. denied*, 520 U.S. 1103 (1997); Brief for the [INS] at 23, *Katsoulis v. INS* (No. 97-379), *cert. denied*, 522 U.S. 1027 (1997).

to apply retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Emphasizing that the presumption against retroactive statutes is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic," *id.* at 265, this Court made clear that courts will not apply a statute retroactively absent an unambiguous directive from Congress.[13] The Court explained that the requirement of express legislation is designed to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. *See also Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

The statutory amendments at issue here change the legal consequences of pre-enactment events and trigger the presumption against retroactive legislation. Legal residents affected by these laws made decisions in their criminal cases – including whether and how to plead – on the basis of the law in effect at the time of those decisions. The very decisions that previously *preserved* eligibility for relief now extinguish that opportunity and can result in compulsory deportation. The new provisions enact a major change that denies relief to anyone classified as an "aggravated felon," even if the conviction constituted a misdemeanor or low-level felony offense,[14]

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[13] The presumption mirrors rules applied in countries throughout the world. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998) (listing countries with similar presumptions). It dates back to antiquity. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

[14] *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor larceny of video game constitutes aggravated felony); *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (misdemeanor theft offense constitutes aggravated felony); *Arias-Agramonte v. INS*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000) (criminal sale of a controlled substance

and even if the individual never served a day in prison.[15] Indeed, applying the new statutes to past convictions precludes relief for persons whose offenses occurred years or decades in the past,[16] an application that raises distinct considerations that Congress did not address. *See United States v. Carlton*, 512 U.S. 26, 37-38 (1994) (O'Connor, J., concurring) (stating that the government's interest

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in the fifth degree, Class D felony under New York State law, constitutes aggravated felony); *United States v. Holguin-Enriquez*, 120 F. Supp. 2d 969 (D. Kan. 2000) (misdemeanor assault with 365-day suspended sentence constitutes aggravated felony).

[15] *See, e.g., Arias-Agramonte*, 2000 WL 1059678 (sentence of probation for 1977 conviction); *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D. N.J. 1999) (five years probation and $5,000 fine); *Grant v. Zemski*, 54 F. Supp. 2d 437 (E.D. Pa. 1999) (eighteen months reporting probation and a fine). *Cf.* Sentencing Commission, Sentencing Guidelines for United States Courts, 66 Fed. Reg. 7962, 8008 (Jan. 26, 2001) (noting that INA definition of aggravated felony is very broad and proposing lowest level sentencing enhancement for illegal reentry by alien convicted of aggravated felony and sentenced to probation for that conviction).

[16] *See, e.g., Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000) (six years between 1991 conviction and INS initiation of proceedings); *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286 (E.D.N.Y. 2000) (thirteen years between 1986 conviction and INS initiation of proceedings); *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000) (six years between 1992 conviction and INS initiation of proceedings for petitioner Robinson); *Grant v. Zemski*, 54 F. Supp. 2d 437 (E.D. Pa. 1999) (seven years between 1992 conviction and INS initiation of proceedings); *Thompson v. Reno*, No. 99-C5551, 2000 WL 361675 (E.D. Pa. Apr. 5, 2000) (eleven years between 1988 conviction and INS initiation of proceedings); *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999) (eighteen years between 1980 conviction and INS initiation of proceedings); *Zalawadia v. Reno*, No. 99-C1837 (W.D. La. 1999), *petition for cert. pending*, No. 00-268 (three years between 1995 conviction and INS initiation of proceedings).

in new laws must at some point give way to the interest of repose). The far-reaching effect of retroactive application of the new law is illustrated by the cases being held for disposition in the lower courts pending resolution of this case. In one case, for example, a 1977 conviction for a low-level felony offense resulted only in a sentence of probation, yet now compels deportation of a longtime legal resident if Section 1182(c) is barred. In that case, the IJ ruled that the legal resident should be allowed to apply for Section 1182(c) relief and held that the equities overwhelmingly warranted granting relief. The BIA reversed on the same legal ground as it applied in this case, namely that Section 1182(c) is completely foreclosed if the immigration proceeding commenced after April 1, 1997. *See Arias-Agramonte v. INS*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000), *appeal pending*, No. 00-2595 (2d Cir.).

Under this Court's retroactivity jurisprudence, whether a new statute should be applied to past events turns on two inquiries. First, did Congress expressly provide for the statute's temporal reach? Second, does application of the new law to past events have a retroactive effect? *See Landgraf*, 511 U.S. at 280. If Congress has not stated expressly that the statute applies to past events, and if its application would have a retroactive effect, the statute must be limited to prospective application.

A. Congress Did Not Provide Expressly For The New Bars To Relief To Apply To Legal Permanent Residents With Pre-Act Convictions.

For legislation to impose new legal consequences based on past events, the statute must contain an "'unambiguous directive' or 'express command' that the statute is to be applied retroactively." *Martin v. Hadix*, 527 U.S. at 354 (quoting *Landgraf*, 511 U.S. at 263, 280). "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one

interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (collecting cases); *see also Shwab v. Doyle*, 258 U.S. 529, 537 (1922) ("[A] statute should not be given a retrospective operation, unless its words make that imperative . . . .").[17]

Neither AEDPA nor IIRIRA contain the requisite express congressional command or unambiguous language that would support applying the new restrictions on Section 1182(c) relief to immigrants whose conduct or convictions pre-date the change in law. The initial restrictions on relief appeared in AEDPA and were set forth in Section 440(d), 110 Stat. 1277. The courts of appeals that have considered the question have held that AEDPA § 440(d) did not include guidance on temporal applicability with respect to past conduct and convictions and that the proper scope of that section depends on the application of the second step of retroactivity analysis.[18] The government does not argue that AEDPA expressly bars eligibility for Section 1182(c) relief, nor is that an issue encompassed within the grant of certiorari.[19]

IIRIRA likewise contains no explicit language addressing the temporal scope of its prohibition on relief

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[17] When noting the type of language required to make a provision unambiguously retroactive, the Court has analogized to the "clear statement" required to override a state's Eleventh Amendment sovereign immunity. *See Lindh*, 521 U.S. at 328 n.4 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *United States v. Williams*, 514 U.S. 527, 531-32 (1995), and *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992)); *see also Landgraf*, 511 U.S. at 288 n.2 (Scalia, J., concurring).

[18] *See, e.g., Mattis v. Reno*, 212 F.3d 31, 36 (1st Cir. 2000) (finding text ambiguous); *Tasios v. Reno*, 204 F.3d 544, 548-52 (4th Cir. 2000) (same); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 307-08 (5th Cir. 1999) (same); *Magana-Pizano v. INS*, 200 F.3d 603, 612-13 (9th Cir. 1999) (same); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999) (same), *cert. denied*, 529 U.S. 1041 (2000).

[19] *See* Questions Presented No. 2, Cert. Pet. at I; *see also* Sup. Ct. R. 14.1(a).

under Section 1182(c). The restrictions enacted by IIRIRA appear in Section 304, 110 Stat. 3009-587. Section 304(a), 110 Stat. 3009-587, re-enacted the substance of the Section 1182(c) waiver provision, maintained the bar on relief for those legal residents who have been convicted of an "aggravated felony," codified the new provision at 8 U.S.C. 1229b, and named it "cancellation of removal." In Section 304(b), IIRIRA then repealed the existing Section 1182(c). Section 304(b) is the only provision in IIRIRA that directly addresses Section 1182(c). It provides, in its entirety, that "Section 212(c) (8 U.S.C. 1182(c)) is repealed." IIRIRA § 304(b), 110 Stat. 3009-597. Nothing in Section 304(b) – nor in any other provision of IIRIRA – explicitly provides a temporal scope or mandates that the repeal of Section 1182(c) should be applied retroactively to conduct or convictions that pre-date AEDPA's or IIRIRA's enactment.

The silence of IIRIRA on Section 304(b)'s temporal reach stands in notable contrast to numerous other provisions in IIRIRA that contain explicit language dictating their temporal scope. In particular, several IIRIRA provisions expressly specify the temporal reach of amendments changing the effect of criminal convictions that pre-date IIRIRA's enactment. For example, IIRIRA § 321(b), 110 Stat. 3009-628, which amends the aggravated felony definition, provides that it applies to "conviction[s] . . . entered *before, on or after*" the date of enactment (emphasis added). Section 321(c), 110 Stat. 3009-628, further provides that the amendment applies "regardless of when the conviction occurred . . . ." Similarly, IIRIRA § 322(c), 110 Stat. 3009-629, which amends the definition of "conviction," provides that it "shall apply to convictions . . . entered *before, on, or after*" the date of the enactment (emphasis added).[20] A multitude of other

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[20] IIRIRA § 321(b), 110 Stat. 3009-628, provides in full: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction

IIRIRA provisions covering a wide range of subjects and appearing throughout the act contain express directives setting forth the temporal scope of new provisions.[21]

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was entered before, on, or after the date of enactment of this paragraph."

IIRIRA § 321(c), 110 Stat. 3009-628, provides in full: "The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act regardless of when the conviction occurred, and shall apply under Section 276(b) of the Immigration and Nationality Act only to violations of Section 276(a) of such Act occurring on or after such date."

IIRIRA § 322(c), 110 Stat. 3009-629, provides in full: "The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act. Subparagraphs (B) and (C) of Section 240(c)(3) of the Immigration and Nationality Act, as inserted by Section 304(a)(3) of this division shall apply to proving such convictions."

[21] *See, e.g.*, IIRIRA § 342(b), 110 Stat. 3009-636 (stating that amendment adding incitement of terrorist activity as ground for exclusion "shall take effect on the date of [IIRIRA's] enactment . . . and shall apply to incitement *regardless of when it occurs*[ ]"); IIRIRA § 344(c), 110 Stat. 3009-637 (providing that amendment adding false claims of U.S. citizenship as ground for removal "shall apply to representations made *on or after* the date" of enactment); IIRIRA § 347(c), 110 Stat. 3009-639 (stating that amendments rendering excludable or deportable any alien who unlawfully voted "shall apply to voting occurring *before, on, or after* the date" of enactment); IIRIRA § 348(b), 110 Stat. 3009-639 (stating that amendment providing for automatic denial of discretionary waiver from exclusion under 8 U.S.C. 1182(h) "shall be effective on the date of [IIRIRA's] enactment . . . and shall apply in the case of any alien who is in exclusion or deportation proceedings *as of such date* unless a final administrative order in such proceedings has been entered as of such date[]"); IIRIRA § 350(b), 110 Stat. 3009-640 (stating that amendment adding offenses of domestic violence and stalking as ground for deportation "shall apply to convictions, or violations of court orders, occurring *after* the date" of

These numerous express temporal provisions demonstrate that Congress recognized its obligation to specify the reach of IIRIRA's amendments to the INA to avoid the default rule of prospective application. Furthermore, they demonstrate that Congress focused its attention on the question of the temporal scope of the new provisions in general and the temporal scope of provisions changing

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enactment); IIRIRA § 351(c), 110 Stat. 3009-640 (addressing relationship required for waivers from exclusion or deportation for smuggling and providing that amendments under subsections (a) and (b) "shall apply to applications for waivers filed *before, on, or after* the date" of enactment); IIRIRA § 352(b), 110 Stat. 3009-641 (providing that amendments adding renouncement of citizenship to avoid U.S. taxation as new ground for exclusion "shall apply to individuals who renounce United States citizenship *on or after* the date" of enactment); IIRIRA § 380(c), 110 Stat. 3009-650 (specifying that amendment imposing civil penalties on aliens for failure to depart "shall apply to actions occurring *on or after*" effective date); IIRIRA § 384(d)(2), 110 Stat. 3009-653 (providing that amendments adding penalties for disclosure of information "shall apply to offenses occurring *on or after* the date" of enactment); IIRIRA § 531(b), 110 Stat. 3009-625 (stating that public charge considerations as ground for exclusion or denial of adjustment of status "shall apply to applications [for visa, admission, or adjustment of status] submitted *on or after* such a date"); IIRIRA § 604(c), 110 Stat. 3009-694 (stating that new asylum provision "shall apply to applications for asylum filed *on or after* the first day of the first month beginning more than 180 days after the date" of enactment) (all emphases added). *See also* IIRIRA § 105(b), 110 Stat. 3009-556; IIRIRA § 212(e), 110 Stat. 3009-571; IIRIRA § 309(c)(5), 110 Stat. 3009-627; IIRIRA § 309(c)(7), 110 Stat. 3009-627; IIRIRA § 341(c), 110 Stat. 3009-636; IIRIRA § 376(c), 110 Stat. 3009-649; IIRIRA § 379(b), 110 Stat. 3009-650; IIRIRA § 381(b), 110 Stat. 3009-650; IIRIRA § 382(c), 110 Stat. 3009-651; IIRIRA § 383(b), 110 Stat. 3009-652; IIRIRA § 412(e), 110 Stat. 3009-668; IIRIRA § 421(b), 110 Stat. 3009-670; IIRIRA § 503(b), 110 Stat. 3009-671; IIRIRA § 505(b), 110 Stat. 3009-672; IIRIRA § 551(c), 110 Stat. 3009-679; IIRIRA § 562(e), 110 Stat. 3009-683.

the effect of a pre-enactment criminal conviction in particular. In short, IIRIRA's silence on the temporal scope of Section 304(b) precludes finding that Congress legislated with the "unambiguous directive" that is required to support retroactive elimination of Section 1182(c).

The government addresses four of IIRIRA's provisions that were mentioned by the court of appeals, and seeks to dismiss them as "miscellaneous minor amendments" that deal mostly with criminal aliens. Pet. Br. 38 & n.20. In fact, provisions concerning criminal convictions and aggravated felonies are especially relevant because they concern the same subject matter that is at issue in Section 1182(c). *See Lindh*, 521 U.S. at 330. The government also attempts to explain away the significance of the explicit temporal provisions in Sections 321 and 322 on the ground that they appear in subtitle III-B, which – the government argues – stands in contrast to subtitle III-A because it "has no general effective date . . . . " Pet. Br. 38. Therefore, according to the government, "Congress addressed the temporal scope of those provisions individually." *Id.* But, of course, subtitle III-B *does* have an effective date – it is the date of IIRIRA's enactment, September 30, 1996, which Sections 321 and 322 both explicitly reference. *See* IIRIRA § 321(c) (applying to "actions taken on or after the date of the enactment of this Act"); IIRIRA § 322(c) (applying "to convictions and sentences entered before, on, or after the date of the enactment of the Act"). The specific temporal provisions, therefore, were not needed to set that date, and they do not do so. Rather, they specify a particular retroactive reach for those particular provisions and thereby satisfy the clear statement requirement. That is the language that is missing from Section 304(b).[22]

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[22] The government also suggests that the contrasting language in other provisions is irrelevant because it appears in a different subsection of subtitle III and originated in different bills. However, explicit temporal language appears throughout

In the absence of any express language dictating a retroactive reach for Section 304(b), the government is forced to rely on inferences. These arguments, however, necessarily acknowledge that an explicit temporal directive is lacking and that the Court should infer a retroactive directive notwithstanding the absence of express language. The presumption against retroactivity prohibits that conclusion.

The first statutory provision to which the government points is the *effective date* provision that governs subtitle III-A. That provision, Section 309(a), 110 Stat. 3009-625, states that most of subtitle A, including Section 304(b)'s repeal of Section 1182(c), is effective on April 1, 1997. As *Landgraf* emphatically held, however, an effective date provision "does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. The fact that Section 304(b) went into effect on April 1, 1997 (which respondent does not dispute), does not, therefore, provide any support for applying the statute to pre-enactment events. *See id.* at 259; *id.* at 288 (Scalia, J., concurring) (the words "shall take effect " are presumed to mean "shall have prospective effect" and "that presumption is too strong to be overcome by any negative inference . . . .").

The government also appears to suggest that IIRIRA's effective date standing alone has greater significance because Section 304(b) *repealed* rather than amended Section 1182(c). But the presumption against retroactivity applies equally in cases where new legal consequences result from the repeal of a prior provision. *See, e.g., United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928); *Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 185-88 (1873). Indeed, *all* retroactivity cases, by

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IIRIRA, including in Title III-A. *See, e.g.*, IIRIRA §§ 301(b)(3), 110 Stat. 3009-578; 301(c)(2), 110 Stat. 3009-579; 306(d), 110 Stat. 3009-612.

definition, involve two legal regimes – the old legal regime and the new legal regime. That is true whether the change is by enactment, repeal or amendment. The question in retroactivity cases, therefore, is not *whether* there are two legal regimes, but *which* legal regime should apply to pre-enactment events.

The government then seeks an inference from IIRIRA § 309(c)(1), 110 Stat. 3009-625, which the government labels a "savings" provision, to achieve a retroactive reach for Section 304(b). Pet. Br. 34-36. But Section 309, 110 Stat. 3009-625, nowhere provides an express statement regarding the availability of Section 1182(c) relief. Rather, Section 309(c), entitled "Transition for Aliens in Proceedings," provides the rules for deportation and exclusion proceedings that were pending on the date the new removal system established by IIRIRA went into effect, and sets forth rules for phasing in the new procedural system enacted by Section 304(a). First, in Section 309(a), Congress specified that the effective date for most of the new provisions of subtitle III-A would be the first day of the first month beginning 180 days from the date of enactment, which became April 1, 1997. Next, in Section 309(b), 110 Stat. 3009-625, Congress provided for the promulgation of new regulations to flesh out the many changes introduced by subtitle III-A and instructed that these regulations be in place thirty days prior to the subtitle III-A effective date. Then, in Section 309(c), Congress addressed the interaction of the new procedural system with the old system and provided that proceedings commenced before the subtitle III-A effective date would continue to be conducted without regard to the changes in the law that were to become effective on April 1, 1997. In particular, Section 309(c)(1) provided the "[g]eneral rule" that aliens who were already in exclusion or deportation proceedings on the effective date of Section 309(a) (April 1, 1997) would not be subject to the amendments of subtitle III-A, and that the proceedings (including judicial review) would be conducted without regard to the amendments.

These transition provisions were necessary to avoid the wholesale application of *every* provision of subtitle III-A to pending deportation and exclusion cases. Absent a specific provision exempting pending cases, all of the new IIRIRA procedures would have applied across the board in every case and would have created procedural confusion for cases already in proceedings. *See Landgraf*, 511 U.S. at 285 n.37 (procedural changes presumptively apply to pending cases). Section 304, for example, provides that the new "removal" proceedings are commenced with a Notice to Appear, IIRIRA § 304(a) (new 8 U.S.C. 1404), rather than an Order to Show Cause; includes different criteria for entering an order of removal for those noncitizens who fail to appear at their hearings, IIRIRA § 304(a) (new 8 U.S.C. 1229a(b)(5)); permits video and telephone conferences, IIRIRA § 304(a) (new 8 U.S.C. 1229a(b)(2)(A)); and creates different rules for motions to reconsider and reopen proceedings, IIRIRA § 304(a) (new 8 U.S.C. 1229a(c)(5)). Without Section 309(c)(1), it would have been unclear which set of procedural rules should apply to pending cases.

In effect, the government is arguing that Section 309(c)(1)'s preservation of the pre-existing framework for some cases is sufficient to achieve a retroactive repeal of the substan-tive criteria of Section 1182(c) for other cases. Pet. Br. 35-36. At best, that argument is based on precisely the sort of negative inference that this Court's retroactivity jurisprudence plainly prohibits. As this Court made clear in *Lindh*, "normal rules of construction" are sufficient to find that Congress intended *prospective* application, but a negative inference is not a sufficient legislative authorization for retroactive application. *See Lindh*, 521 U.S. at 325-26 ("'unambiguous directive' is necessary to authorize 'retroactive application'") (quoting *Landgraf*, 511 U.S. at 264); *see also Landgraf*, 511 U.S. at 288 (Scalia, J., concurring) ("The short response to [the negative inference argument] is that refinement and subtlety are no substitute for clear statement.").

Finally, the government seeks to explain the lack of specific language on temporal applicability by arguing that subtitle III-A constituted a comprehensive revision of the INA. It suggests that in the context of such a "comprehensive" revision Congress is under no obligation to state expressly whether substantive changes in eligibility for relief apply to past events. Pet. Br. 33-34. But there is nothing about a "comprehensive" revision that answers the question of temporal applicability.[23] *Landgraf* itself involved a major revision of the civil rights laws, and there the Court held that those revisions, in and of themselves, do not speak to the analytically separate question of whether the amendments should apply to pre-enactment events. *Landgraf*, 511 U.S. at 260-61; *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308 (1994) (that legislation was passed to restore racial discrimination remedy available under prior case law does not mean that Congress meant to further that purpose with respect to cases arising prior to the new statute); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954) (rejecting government's argument that its construction of the statute would further "broad congressional purpose to terminate the United States residence of criminal aliens").

The government protests that the court of appeals has created "a hybrid form of proceeding," Pet. Br. 34, in which aliens in removal proceedings seek to apply for relief from deportation under Section 1182(c). But "removal" is simply a new name for deportation and a person in these proceedings – under either procedural scheme – is charged with being "deportable" under 8

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[23] The government cites to *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976), for the proposition that a comprehensive revision should be understood as implicitly repealing a prior law. The question, however, is not whether Congress repealed Section 1182(c), but whether the repeal applies retroactively to past events.

U.S.C. 1227 ("Deportable Aliens").[24] Now, as before, the INA sets forth the grounds that render aliens "deportable." *See* former 8 U.S.C. 1251 (1994) ("Deportable Aliens"); 8 U.S.C. 1227 (Supp. V 1999) ("Deportable Aliens"). Similarly, the relevant equitable criteria for adjudicating a claim for "cancellation of removal" are the same as for a waiver under Section 1182(c). *In re C-V-T-*, Int. Dec. No. 3342, 1998 WL 151434 (BIA 1998).[25] The only issue is whether respondent is barred from receiving such relief, not the label it is given.

The government's view of Section 304(b) would lead, moreover, to a result that Congress did not specifically contemplate and likely did not intend. The law governing past convictions would depend entirely on the happenstance of when the INS decides to institute proceedings, and would apply to people who were convicted ten or twenty years ago. *See, e.g., Wallace v. Reno*, 24 F. Supp. 2d 104, 115 (D. Mass. 1998) ("For many [immigrants] the connection between conviction and deportation [is] neither [] immediate nor [] direct. Years might elapse between conviction and deportation, with the deportation

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[24] The terms "deportation" and "removal" are interchangeable terms in many parts of the INA. Moreover, Section 1227, which contains the general classes of deportable aliens, continues to contain a provision entitled "waiver of deportation" that applies to certain visa holders. *See, e.g.*, 8 U.S.C. 1227(c) (providing for a "waiver of deportation" to specified classes of immigrants).

[25] Moreover, the government's semantic argument focusing on immigration terminology disregards the fact that the Section 1182(c) waiver was never formally denominated a "waiver of deportation" since it originally arose in "exclusion" proceedings. *See* Pet. Br. 3 n.1 (citing *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976)). There is nothing novel in preserving Section 1182(c) for the limited group of legal permanent residents who were eligible for that relief under the law at the time of the event triggering their deportation.

proceedings not triggered by the conviction itself but by a lawful resident's random contacts with the INS."), *aff'd*, 194 F.3d 279 (1st Cir. 1999). *See also Arias-Agramonte*, No. 00-C2412, 2000 WL 1059678 (S.D.N.Y. Aug. 1, 2000); *Velasquez v. Reno*, 37 F. Supp. 2d 663, 664 (D.N.J. 1999). In fact, persons with *lesser* convictions who were not an enforcement priority in earlier times would find themselves subject to a *harsher* legal regime in which they could not seek the relief that they could have sought had the INS moved more promptly to place them in proceedings. *See Mojica v. Reno*, 970 F. Supp. 130, 171 (E.D.N.Y. 1997) ("Retroactivity generally targets those whom the INS once decided *not* to detain and place in deportation proceedings. It denies them the relief that was available to their fellow inmates who had deportation proceedings against them commenced in a timely manner.") (emphasis in original), *aff'd in part sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

Congress could have decided that the passage of time and the intervening conduct of legal residents is irrelevant and that their deportation should be mandatory nonetheless. But application of the new statute to those immigrants poses distinct considerations. IIRIRA does not contain any express manifestation that Congress "affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay . . . ." *Landgraf*, 511 U.S. at 272-73. Absent such explicit language, Congress has not directed that the retroactive elimination of Section 1182(c) relief should apply to pre-enactment events.[26]

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[26] The presumption against retroactivity is underscored by the fact that this case concerns the deportation of a legal permanent resident. The Court has repeatedly noted that it will construe "any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Costello v. INS*, 376 U.S. 120, 128 (1964). The rule of lenity complements the *Landgraf* rule by assuring that Congress has given due consideration to the extreme

B. Changing The Possibility Of Deportation Into Mandatory Deportation Is A New Legal Consequence.

Whether application of a new law to past events has a retroactive effect depends upon a "common sense functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (*quoting Landgraf*, 511 U.S. at 270). The Court's evaluation of new legal consequences "is informed and guided by 'familiar considerations of fair notice, reasonable reliance and settled expectations.'" *Martin v. Hadix*, 527 U.S. at 358 (*quoting Landgraf*, 511 U.S. at 270). An impermissible retroactive effect may result, for example, when a statute "increase[s] a party's liability for past conduct," *Landgraf*, 511 U.S. at 280; "attaches a new disability, in respect to transactions or considerations already past," *id.* at 268 (internal citations omitted); "sweep[s] away settled expectations suddenly and without individualized consideration," *id.* at 266; "changes the legal consequences of acts completed before [the new law's] effective date," *id.* at 269 n.23 (internal citations omitted); or "gives a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," *id.* (internal citations omitted).[27]

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consequence of deportation even in statutes where retroactive application of a new law is not at issue. Where retroactivity does arise, the rule of lenity, like the *Landgraf* rule, assures that a new immigration law will be applied to past conduct only when Congress clearly intended that result.

[27] In defining what constitutes a "retroactive effect," the government cites Justice Story's formulation in *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814). *See* Pet. Br. 45. However, this Court has held that Justice Story's formulation "does not purport to define the outer limit

For many lawful permanent residents, the change in law at issue would convert a possibility of deportation into a certainty. Respondent's opportunity to seek a waiver of deportation would be extinguished. As a result, the pre-enactment plea that previously allowed for Section 1182(c) relief would now cause mandatory deportation. Regardless of whether the change in law is viewed as attaching a new disability, *Landgraf*, 511 U.S. at 269 & n.23 (citing *Soc'y for the Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814)); *Hamilton Murray v. Gibson*, 56 U.S. 421, 424 (1853) (inability to introduce evidence of past judgment); as increasing a liability for past conduct, *Landgraf*, 511 U.S. at 280; *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304, 313 (1994); as sweeping away settled expectations without individualized consideration, *Landgraf*, 511 U.S. at 266; or as eliminating a functional defense to removal, *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997), it would constitute a new legal consequence, namely precluding application for the Section 1182(c) waiver and thereby compelling deportation.[28]

Under the government's view, any legal resident who is subjected to immigration proceedings after April 1, 1997 would be barred from seeking Section 1182(c) relief. Thus, immigrants whose criminal offense occurred years or decades earlier would be barred even though they were indisputably eligible for the waiver at that time and the INS did not, for whatever reason, initiate proceedings. Because

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of impermissible retroactivity." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (1997).

[28] The severity of deportation is undisputed. *See, e.g., Barber v. Gonzales*, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter inflict 'the equivalent of banishment or exile.'") (*quoting Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The severity is all the greater in the case of legal residents who have developed the ties that go with permanent residence. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

the immigration laws contain no statute of limitations, immigrants who made decisions in their criminal cases on the basis of the then-governing immigration law, whose criminal convictions may have occurred long ago, who have acted in complete compliance with the law since then, and who now may have the *strongest* claims for equitable relief, would be completely barred. In *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999), for example, a single conviction nineteen years ago that resulted in probation would serve as the basis for extinguishing legal resident status and compel the respondent's deportation without regard to decades of positive equities. *See generally supra* note 16 (collecting cases); Brief *Amici Curiae* of the Florida Immigrant Advocacy Center, *et al.* (collecting examples).

In *Costello v. INS*, 376 U.S. 120 (1963), this Court recognized that legal residents who are charged with crimes make decisions – including whether and how to plead guilty – based on the impact that their decisions will have on the likelihood of deportation and the opportunity to seek discretionary relief. In that case, the Court considered whether criminal convictions that occurred when the defendant was deemed to be a citizen could subsequently be used as the basis for deportation when the defendant had lost his citizenship status. The Court held that the deportation could not be based on those criminal convictions because the alien might have made different strategic judgments or offered to plead guilty to a particular count based on the immigration consequences of the conviction:

> [T]he petitioner points out that had he held alienage status at the time of his trial for income tax evasion, he could have offered to plead guilty to one count of the indictment in return for a nolle prosequi of the other counts, and that the conviction on one count would not have made him subject to deportation . . . .

Id. at 130-31. *See also Fiswick v. United States*, 329 U.S. 211, 221-22 (1946) (potential hazards of deportation constitute a serious collateral consequence that prevents an appeal of a criminal conviction from becoming moot). *Costello* further

noted the importance of the opportunity to seek discretionary relief. The decision emphasized that if the defendant had been an alien at the time of the conviction, he could have applied for relief authorized by the immigration act. "Even more important, had petitioner been an alien at the time of his convictions, he could have availed himself of the supplementary relief procedure provided for" by the INA. *Costello*, 376 U.S. at 131.[29]

As *Landgraf* and *Martin v. Hadix* explained, "fair notice, reasonable reliance and settled expectations" are the touchstones that guide retroactivity analysis. *Martin v. Hadix*, 527 U.S. at 358 (citing *Landgraf*, 511 U.S. at 270). Just as the defendant in *Landgraf* was entitled to notice of the degree of liability for unlawful sexual harassment, 511 U.S. at 281-85, so a legal resident immigrant is entitled to notice of a change in immigration liability resulting from his behavior. *See also Rivers*, 511 U.S. at 309-10 (defendant entitled to notice of statutory basis for liability even when prior law had been interpreted as creating liability); *Hughes Aircraft*, 520 U.S. at 947-51 (defendant entitled to notice of change in defense against *qui tam* relator, even when there was no defense against United States for action based on the same underlying fraud). As the Court has long recognized in relation to the deportation consequences of criminal convictions, notice to legal residents is essential. *See Jordan v. De George*, 341 U.S. 223, 230 (1951) (evaluating deportability grounds under vagueness doctrine to determine whether the statute "fairly apprise[d] aliens of the consequences which follow after conviction and sentence"); *see also id.* at 243 (Jackson, J., dissenting) (notice of the circumstances that will lead to deportation recognizes that "[d]eportation proceedings technically are not criminal; but practically they are for they

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[29] *Costello* referred to a "judicial recommendation against deportation," which the alien could request in the criminal proceeding and which operated, like Section 1182(c), as a mechanism for tailoring the deportation law to the individual facts of the case.

extend the criminal process of sentencing to include on the same conviction an additional punishment of deportation").

Likewise, reasonable reliance and settled expectations are upset by a new legal regime that deprives legal residents of the waiver eligibility they had under the immigration statutes at the time they entered into plea agreements. For noncitizens, the opportunity to preserve their lawful resident status is often the foremost concern when confronted with prosecution for a deportable criminal offense. As courts have regularly recognized, a significant consideration that immigrants and their counsel weigh in the criminal justice system is the likelihood of deportation and the eligibility for Section 1182(c) relief. *See, e.g., Jideonwo v. INS*, 224 F.3d 692, 695 (7th Cir. 2000); *Tasios v. Reno*, 204 F.3d 544, 546 (4th Cir. 2000); *Reverdes v. Reno*, 95 F. Supp. 2d 22, 28 (D. Mass. 2000); *Tam v. Reno*, No. 98-C2835, 1999 WL 163055, at *1 (N.D. Cal. Mar. 22, 1999), *rev'd on other grounds*, 2001 WL 30677 (9th Cir. Jan. 11, 2001).

In some cases, those considerations are evidenced directly in the plea negotiation. For example, in *Jideonwo*, the court noted that the "sentence was the subject of considerable negotiation between the government and Jideonwo's attorney," 224 F.3d at 695, and that "*the whole point* of the plea negotiations in [Jideonwo's] criminal case" was to preserve the availability of equitable relief from deportation. *Id.* at 699 (emphasis added and internal quotation marks omitted). As a result of the negotiations with the prosecutors, Mr. Jideonwo agreed to provide "his assistance and that of his family in a federal drug investigation." *Id.* at 695. In turn, Mr. Jideonwo received a sentence that was a "considerable downward departure from the sentencing range for the crime to which he pled guilty," which preserved the availability of equitable relief from deportation. *Id.*[30]

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[30] *See also Tam*, 1999 WL 163055 (noting that public defender informed client that "he would have the right to seek relief from deportation under Section [1182(c)] of the INA as it

As evidenced by the actions and duties of lawyers and judges, the criminal justice system recognizes the close relationship between convictions, pleas, and deportation. Criminal defense lawyers, guided by ethical standards and numerous treatises, are obliged to advise legal residents of the immigration consequences of a guilty plea and whether the plea would preserve the opportunity for relief. *See* Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, *et al.* Prosecutors sometimes structure pleas in order to preserve equitable relief when the imposition of mandatory deportation would be too harsh a consequence given the facts of the case or the circumstances of the prosecution. *See Jideonwo*, 224 F.3d at 695 (prosecutor and defense lawyer structured plea to preserve availability of equitable relief); *cf. Allen v. Hardy*, 478 U.S. 255, 260 (1986) (prosecutors rely on the legal regime in place at the time of trial). In addition, judges in many states are required to ensure that defendants are aware that a decision to accept a plea could have immigration consequences.[31]

Legal residents who pled guilty before the change in law and, as a result, now face mandatory loss of their legal status, may have chosen to go to trial; may have sought to plead to other charges; may have pursued appeals; may have devoted greater resources to their defense; and may have focused on other issues in the criminal proceeding if they could have known the consequence of their plea under the

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stood at that time if he served a sentence of less than five years").

[31] *See* Conn. Gen. Stat. § 54-1j (1994 & Supp. 2000). *See also, e.g.*, Cal. Pen. Code § 1016.5 (West 1985); D.C. Code Ann. § 16-713 (1997 & Supp. 2000); Fla. R. Crim. P. 3.172(c)(8) (1999); Haw. Rev. Stat. Ann. § 802E-2 (Michie 1999); Mass. Gen. Laws Ann. ch. 278, § 29D (1992 & Supp. 2000); Mont. Code Ann. § 46-12-210(f) (1997); N.Y. Crim. Proc. Law § 220.50(7) (McKinney Supp. 1999); Ohio Rev. Code Ann. § 2943.031 (Banks-Baldwin 1997); Or. Rev. Stat. § 135.385(2)(d) (1997); Tex. Crim. Proc. Code Ann. § 26.13(a)(4) (West 1989); Wash. Rev. Code Ann. § 10.40.200 (West 1990); Wis. Stat. Ann. § 971.08(1)(c) (West 1998).

new law. *See* Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, *et al. Cf. Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000) (Easterbrook, J.) (finding that new law cannot be applied retroactively in part because a "reasonable person in Slusser's position would have assumed that his maximum exposure was $600,000 and financed his defense accordingly"). Because the INA's statutory definition of "aggravated felony" is highly technical and bears no intuitive relationship to the designation of offenses under the criminal law (*see supra* notes 14 & 15), the change to a regime in which an aggravated felony conviction alone (without regard to the sentence served) compels deportation will significantly alter the critical issues in a criminal case.[32]

Notwithstanding the new legal consequences that the statute would impose, the government argues that there can be no retroactive effect. Pet. Br. 43-45. The fact that the new statute imposes additional consequences on conduct that was already unlawful does not, of course, diminish the retroactive effect. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is

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[32] For instance, the only criterion for determining whether a conviction for fraud or tax conviction constitutes a disqualifying "aggravated felony" is whether the amount of loss exceeds $10,000. 8 U.S.C. 1101(a)(43)(M). Unless that is the case at the time of trial, defendants will not know to focus on the amount of the alleged loss as a critical matter on which to offer proof in addition to the other issues that are present in the case. Similarly, in the case of theft crimes, the only criterion in determining whether the crime will be classified as an aggravated felony is whether the sentence is one year, even if the sentence is suspended. Therefore, in negotiations over a plea and sentence, a legal resident must pay close attention to the nominal sentence, even if the sentence will be suspended. Indeed, a person who is eager to preserve the opportunity for relief and prevent mandatory deportation would choose a shorter definite sentence (even though it would require imprisonment) over a longer suspended sentence (that would not require any imprisonment).

inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35. The Court has repeatedly found retroactive effect even though the underlying conduct was already sanctionable under prior law. *See, e.g., Hughes Aircraft*, 520 U.S. at 947; *Rivers*, 511 U.S. at 301-02, 313.

The fact that Section 1182(c) relief is "discretionary" is equally beside the point. Changes affecting the opportunity to prevent a consequence have a retroactive effect, even if those consequences depend on the decisions of others. In *Hughes Aircraft*, the Court held that a change in law had a retroactive effect, even though the change at issue – the elimination of a particular defense in a private suit – did not affect petitioner's maximum liability. 520 U.S. at 948. Rather, the change only made it more likely that the petitioner would be subject to suit because the government might exercise its discretion differently than a private litigant. *Id.* at 949.[33] The Court held that such a change had an impermissible retroactive effect because, as a functional matter, it "attach[ed] a new disability." *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269). *See Tasios*, 204 F.3d at 553 (Luttig, J., concurring) ("I join the court's opinion with respect to the retroactive effect [of the elimination of Section 1182(c)] largely, though not exclusively, because of the Supreme Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer . . . .*"). *See also Louis Vuitton v. Spencer Handbags Corp.*, 765 F.2d 966, 970 (2d Cir. 1985) (denying retroactive application to statute that made treble damages the presumptive award, rather than the maximum possible award). *Cf. Costello v. INS*, 376 U.S. 120

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[33] At issue in *Hughes Aircraft* was the *qui tam* provision of the False Claims Act, 31 U.S.C. 3730(b). Under pre-1986 law, a party could defend against such a *qui tam* action on the grounds that the false information that formed the basis for the suit was already in the government's possession; a 1986 amendment, however, removed this defense. The question before the Court was whether the amendment eliminating the defense should apply to conduct pre-dating the amendment's enactment. *Hughes Aircraft*, 520 U.S. at 941.

(1964) (noting importance of opportunity for alien to apply for discretionary relief from deportation based on criminal conviction).

In the related context of the Ex Post Facto Clause – which the Court has regularly turned to in analyzing whether a civil statute is impermissibly retroactive, *see, e.g., Hughes Aircraft*, 520 U.S. at 948 (citing *Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167 (1925)); *Landgraf*, 511 U.S. at 266-67, 269 n.23 (citing *Miller v. Florida*, 482 U.S. 423 (1987) and *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)) – a change affecting the likelihood of relief is impermissibly retroactive, even when the maximum consequences are unaltered and the relief is discretionary.

In *Lindsey v. Washington*, 301 U.S. 397 (1937), the Court held that the change from a maximum indeterminate sentence to an equally long mandatory sentence was impermissibly retroactive. Even though the petitioners could have been sentenced to the identical prison sentence terms, the Court found an additional disability because it removed the *possibility* of a lighter sentence. "Removal of the *possibility* of a sentence of less than fifteen years . . . operates to [defendants'] detriment" because "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all *opportunity*" to receive a lower sentence. *Id.* at 401-02 (emphases added).

Similarly, in *Weaver v. Graham*, 450 U.S. 24, 36 (1981), the Court held that a statute affecting the "gain-time" credits affecting prisoners' early release operated retroactively even though the change did not affect the maximum possible penalty. The Court recognized that the gain-time allowance "is an act of grace rather than a vested right," *id.* at 28; *see also id.* at 30-31 (gain-time accorded "by the grace of the legislature"), but nonetheless held that the petitioner was "disadvantaged by the *reduced opportunity*" to shorten his time in prison. *Id.* at 33-34 (emphasis added); *see also id.* at 37 (Blackmun, J., concurring in the judgment) (new statute "remove[d] some of petitioner's hope and a portion of his opportunity").

Hughes Aircraft, *Lindsey*, and *Weaver* definitively refute the contention that a change affecting the opportunity for a

favorable exercise of discretion does not have an impermissible retroactive effect. Indeed, Section 1182(c) relief from deportation is less discretionary and more predictable[34] than the situations in *Hughes Aircraft*, 520 U.S. at 949 (depending on discretionary decisions of prosecutors); *Lindsey*, 301 U.S. at 797-98 (depending on sentencer's decision in fixing an indeterminate sentence); and *Weaver*, 450 U.S. at 26 & n.2, 28, 35 n.19 (depending on grant of gain-time credits, even when created by legislature as act of grace and awarded when prisoner "has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him" and on other discretionary bases). As the Fourth Circuit concluded: "It is of no consequence here that [Section 1182(c)] relief is discretionary. . . . [A]ny change from a system of discretionary relief to one of prescribed outcomes is retroactive." *Tasios*, 204 F.3d at 522.

The government also argues that pleas are not a relevant event for retroactivity analysis because the immigration statutes speak in terms of convictions. That is an artificial distinction. This Court has emphasized that the retroactivity inquiry "demands a common sense functional judgment" of whether new legal consequences attach. *Martin v. Hadix*, 527 U.S. at 345. For legal residents (like respondent) who pled guilty under the prior legal regime, convictions based on pleas rendered them deportable and now prohibit their eligibility for relief. Moreover, as the court of appeals and other courts have recognized, a guilty plea is the point at which the reliance aspect of retroactivity is most plainly present. *See* Pet. App. 26a-29a; *Tasios*, 204 F.3d at 551 (noting that alien may act in reliance on the prospect of Section 1182(c) relief by waiving right to trial and pleading guilty). Furthermore, as in *Hughes Aircraft*, the Court need not decide the precise event for all cases, *see* 520 U.S. at 946 n.4 (not deciding which

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[34] The standards governing an IJ's exercise of discretion for adjudication of Section 1182(c) waivers are established by decades of BIA precedent. *See supra* note 1 and accompanying text.

is a relevant event for retroactivity), since whether the relevant event is considered the criminal conduct, the plea, or the conviction, all of the relevant events occurred for this respondent prior to the enactment of the new law.[35]

Finally, the government compares the elimination of discretionary relief from deportation to a court's injunction and argues that the change in law does not, therefore, impose a retroactive effect. Pet. Br. 42-43. Cases concerning injunctions are, however, wholly distinct. An injunction is a continuing order of the Court that is always subject to revision based on changes in the law. *See Miller v. French*, 530 U.S. 327, 344 (2000). A removal hearing for a legal resident, in contrast, is an adjudication of whether a status should be revoked based on a past event. Although current facts are relevant, an award of Section 1182(c) relief – unlike an injunction – is not conditional, is not subject to revocation based on subsequent events, and leads to a final determination on the charge of deportability. *See Matter of Przygocki*, 17 I. & N. Dec. 361 (BIA 1980) (award of relief under Section 1182(c) is not conditional); *see also Matter of Gordon*, 20 I. & N. Dec. 52 (BIA 1989). In short, "[w]hen determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural', 'collateral') to the statute; we must ask whether the statute operates retroactively." *Martin v. Hadix*, 527 U.S. at 359.

C. There Is No Deportation Exception To The Presumption Against Retroactivity.

1. Although the government presents its argument as fitting within this Court's retroactivity jurisprudence, its principal claim is that changes in the law affecting a legal resident's ongoing right to remain in this country can never

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[35] In selecting the relevant event, this Court has looked to the irrevocable act of the person who would suffer the effects of the new law. *See Martin v. Hadix*, 527 U.S. at 360 (relevant date is work performed before notice of the new cap on attorney's fees).

qualify as retroactive. *See* Pet. Br. 40 (asserting that Congress's plenary power over immigration means that deportation laws, no matter how much they turn on past facts, are "inherently prospective" and not subject to the presumption against retroactive application of new statutes). This assertion is extraordinary, especially as applied to provisions that would extinguish the lawful status of legal residents. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").[36] The government also makes the related argument that there can be no retroactive effect because the disability occurs in the future. But, if a new law attaches a new disability based on past events, the disability necessarily occurs in the future. *See, e.g., Hamilton Murray v. Gibson*, 56 U.S. 421, 423-25 (1853) (ability to enforce prior judgments); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 768 (C.C.N.H. 1814) (ability to enjoy unimpaired title to land). *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) (treating imposition of costs of Black Lung program as retroactive although program addressed ongoing allocation of expenses of ongoing costs).

This Court has consistently applied the presumption against retroactive legislation in cases concerning the rights of legal residents who faced bars to reentry or deportation. In *Chew Heong v. United States*, 112 U.S. 536, 538-39 (1884), for example, a case cited and discussed by the *Landgraf* Court,

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[36] The government argues that there is no retroactive effect because immigration proceedings are designed to end an "ongoing violation of law." Pet. Br. 50-51. However, that has no application here where the aliens are legal permanent residents, at least until there is an entry of a final order of deportation – after adjudication of waiver applications. 8 C.F.R. 1.1(p); *Matter of Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981) ("[L]awful permanent resident status of an alien . . . end[s] with the entry of a final administrative order of deportation."). In any case, Congress has provided for relief that aliens subject to deportation are eligible to pursue.

the issue was whether a Chinese legal resident of this country would be prohibited from reentering the United States based on a certificate requirement that was enacted after his departure. The government argued that entry should be barred based on the intervening law. The Court refused to read the statute as taking away a right to reenter possessed by the individual before his trip without a clear statement of congressional intent. Quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), a landmark case on the presumption against retroactivity, the Court endorsed and applied the established presumption against retroactive legislation. *Chew Heong*, 112 U.S. at 559 ("Words in a statute ought not to have retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied; and such is the settled doctrine of this Court."). The Court reaffirmed this holding four years later in *United States v. Jung Ah Lung*, 124 U.S. 621, 633 (1888).[37] *See also Ng Fung Ho v. White*, 259 U.S. 276, 280-81 (1922) (avoiding issue of retroactive construction of deportation statute because there was an independent ground of deportability); *Luria v. United*

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[37] The government implicitly acknowledges the force of *Chew Heong* but suggests that it is different because it did not involve a claim to discretionary relief. As discussed above, that makes no difference. The government also seeks to distinguish *Chew Heong* on the ground that Congress had expressly granted the legal resident a right to remain. But the noncitizen in *Chew Heong* had no more right to remain than a permanent resident has under current law. *See Chew Heong*, 112 U.S. at 560 (explaining that the certificate provided the "privilege" to "go from and return to the United States"). The crucial point was that the Court would not read a retroactive intent into Congress's prior laws without an express statement from Congress. Notably, the noncitizens in *Chew Heong* and *Jung Ah Lung* were at the border seeking to enter, and these cases were decided before this Court recognized that returning legal residents have a greater constitutional status than other aliens at the border. *See Landon v. Plasencia*, 459 U.S. at 30.

States, 231 U.S. 9, 21-23 (1913) (finding express congressional intent to apply statute retroactively); *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) (finding no express congressional intent to apply deportation statute to past acts).

Ultimately, the government conflates this Court's precedents regarding the constitutional power of Congress to enact retroactive deportation laws with the question of whether Congress "itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. For example, the government quotes from *Mahler v. Eby*, 264 U.S. 32 (1924). Pet. Br. 41. *Mahler*, however, concerned a statute that included expressly retroactive grounds of deportability.[38]

The issue of Congress's constitutional power is entirely separate from the question of whether Congress has exercised its power. Indeed, this Court's decisions upholding the power of Congress to enact retroactive deportation laws followed cases in which this Court required a clear statement of Congress's intent to reach back in time and change the consequences of past acts. *See Fong Yue Ting v. United States*, 149 U.S. 698, 719-720 (1893) (describing how the constitutional issues were reached with respect to the Act of May 5, 1892, following the Court's earlier decisions in *Chew Heong* and *Jung Ah Lung*, which denied retrospective reach to earlier statutes that lacked express retroactive intent); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 n.15 (1952) (describing how constitutional issues were reached with respect to the Alien Registration Act of 1940, and following Court's earlier decision in *Kessler* in which the Court held that an earlier statute lacked clear intent to reach past acts). *See also Lehmann v. INS*, 353 U.S. 685, 690 (1957) (upholding constitutionality of retroactive provisions of the INA where Court found that it was

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[38] *See* Act of May 10, 1920, ch. 174, § 2, 41 Stat. 593 (providing for deportability of "aliens of the following classes" including "all aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate [the Selective Service Act]").

"indisputable . . . that Congress was legislating retrospectively" through a statutory provision that applied "notwithstanding . . . that the facts by reason of which any such alien belongs to any of the classes enumerated . . . occurred prior to the date of enactment"). Under this authority, Congress may in some cases legislate retroactively in the immigration realm if it does so explicitly and rationally.[39] But whatever the power of Congress to enact retroactive laws, it must legislate expressly and assess the consequences of retroactive application of new deportation laws.

2. Finally, the government's decision to apply Section 304(b) retroactively cannot be saved by reliance on *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first step of *Chevron* requires that courts employ the "traditional tools of statutory construction" to determine the meaning of the statute. *Id.* at 842 n.9. Included in these tools are established canons of interpretation. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987). *See also NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998); *EEOC v. Arabian-American Oil Co.*, 499 U.S. 244, 248 (1991). These "traditional tools of statutory construction" include the presumption against retroactive application

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[39] As the court below found, retroactive elimination of relief from deportation may raise issues of constitutionality under this Court's due process jurisprudence. Due process requires that Congress have a separate purpose that justifies the retroactive aspects of new legislation. *See Pension Benefit Guar. Corp. v. Gray*, 467 U.S. 717, 730 (1984). In addition, as the Seventh Circuit found in *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000), retroactive application raises difficult constitutional issues regarding the "mousetrapping" of criminal defendants who entered into pleas with the government in reliance on laws that did not preclude relief from deportation. *Id.* at 697-701. *See also Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (1957) (Black, J., dissenting) (arguing that retroactive deportation laws should be scrutinized under the Ex Post Facto clause).

of new statutes. *Landgraf*, 511 U.S. at 264. *See also, e.g., Goncalves v. Reno*, 144 F.3d 110, 127 (1st Cir. 1998).

Furthermore, the basic assumption underlying *Chevron* deference is that Congress left an ambiguity in a statute to be filled by the agency. *See Chevron*, 467 U.S. at 843. The *Landgraf* rule, however, is designed to resolve precisely such ambiguities in the case of retroactive laws. The purpose of the presumption against retroactivity is to assure that Congress has considered the unfairness of retroactive application and that absent an explicit *congressional* intent, the statute applies only prospectively. *See generally Henderson v. INS*, 157 F.3d 106, 129 n.29 (2d Cir. 1998) (retroactivity question is a "pure question of statutory construction for the courts to decide, . . . a question that is quite different from the question of interpretation that arises in each case in which the agency is required to apply [statutory] standards to a particular set of facts which involves the agency's particular expertise") (quoting *Goncalves*, 144 F.3d at 127) (alterations in original) (internal quotation marks omitted); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1148 (10th Cir. 1999) (deciding retroactivity question "without affording any deference" to Attorney General's decision because *Chevron* deference was inappropriate in that context), *cert. denied*, 529 U.S. 1041 (2000). *Cf. Massachusetts v. United States Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996) (canon of construing statutes to avoid preemption of state laws is not subject to *Chevron* deference). Therefore, *Chevron* has no role in relation to the retroactivity question presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
A. Jurisdiction	1
B. Merits	10

TABLE OF AUTHORITIES

Cases:

Bollman, Ex parte, 8 U.S. (4 Cranch) 75 (1807)	4
Brady v. *United States*, 397 U.S. 742 (1970)	19
Bugajewitz v. *Adams*, 228 U.S. 585 (1913)	18
Calcano-Martinez v. *INS*, cert. granted, 121 S. Ct. 849 (2001)	3
Chew Heong v. *United States*, 112 U.S. 536 (1884)	18
Daneshvar v. *Chauvin*, 644 F.2d 1248 (8th Cir. 1981)	7
De Osorio v. *INS*, 10 F.3d 1034 (4th Cir. 1993)	15
Felker v. *Turpin*, 518 U.S. 651 (1996)	4, 5
Galaviz-Medina v. *Wooten*, 27 F.3d 487 (10th Cir. 1994), cert. denied, 513 U.S. 1086 (1995)	7
Garay v. *Slattery*, 23 F.3d 744 (2d Cir. 1994)	7
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	17
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999)	9
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	12
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	17
Kansas v. *Hendricks*, 521 U.S. 346 (1997)	19-20
Knowlton v. *Moore*, 178 U.S. 41 (1900)	8
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	11, 16, 18, 19, 20
Mahler v. *Eby*, 264 U.S. 32 (1924)	17
Martin v. *Hadix*, 527 U.S. 343 (1999)	14
Orozco v. *INS*, 911 F.3d 539 (11th Cir. 1990)	8
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)	1, 13, 17

Cases—Continued: Page

Reno v. *Goncalves*, 526 U.S. 1004 (1999) 9
Samaniego-Meraz v. *INS*, 53 F.3d 254 (9th Cir. 1995) 15
Scheidemann v. *INS*, 83 F.3d 1517 (3d Cir. 1996) 15
Singh v. *Reno*, 182 F.3d 504 (7th Cir. 1999) 9
Sotelo Mondragon v. *Ilchert*, 653 F.2d 1254 (9th Cir. 1980) 8
Stone v. *INS*, 514 U.S. 386 (1995) 6
Turkhan v. *Perryman*, 188 F.3d 814 (7th Cir. 1999) 9
United States v. *Fisher*, 6 U.S. (2 Cranch) 358 (1805) 8
United States v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) 8
United States ex rel. Marcello v. *District Director*, 634 F.2d 964 (5th Cir. 1981) 7, 8
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 (1869) 4

Constitution and statutes:

U.S. Const. Art. III 4
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 15
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 401(e), 110 Stat. 1268 ..... 5, 7, 8
§ 440, 110 Stat. 1276 14
§ 440(a), 110 Stat. 1276-1277 9
Hobbs Adminstrative Orders Review Act, 28 U.S.C. 2341 *et seq.* 1
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
Tit. III-A, 110 Stat. 3009-575 ..... 11, 12, 13, 14, 15
§ 301(b)(3), 110 Stat. 3009-578 14
§ 301(c)(2), 110 Stat. 3009-579 14
§ 304, 110 Stat. 3009-587 ..... 11, 13, 16
§ 304(a), 110 Stat. 3009-587 12

Statutes—Continued: Page

§ 305, 110 Stat. 3009-597 12
§ 306, 110 Stat. 3009-607 11
§ 306(a), 110 Stat. 3009-607 13
§ 306(c)(1), 110 Stat. 3009-612 13
§ 306(d), 110 Stat. 3009-612 14
§ 309, 110 Stat. 3009-625 13
§ 309(a), 110 Stat. 3009-625 ..... 11, 12
§ 309(c), 110 Stat. 3009-625 ..... 11, 12
§ 309(c)(1), 110 Stat. 3009-625 12
§ 309(c)(2), 110 Stat. 3009-626 12
§ 309(c)(3), 110 Stat. 3009-626 12
§ 309(c)(4), 110 Stat. 3009-626 13
§ 309(c)(5), 110 Stat. 3009-627 13
Tit. III-B, 110 Stat. 3009-627 ..... 14, 15
§ 321, 110 Stat. 3009-627 to 3009-628 ..... 15, 16
Immigration Act of 1990, Pub. L. No. 101-649, § 511(b), 104 Stat. 5052 15
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1105a(a) (1994) 5, 6, 7, 8
8 U.S.C. 1105a(a)(10) (1994) 5, 6, 7, 8
8 U.S.C. 1182(c) (1994) 2, 10, 11, 14, 15, 16, 18, 19, 20
8 U.S.C. 1225(b)(1) (Supp. V 1999) 1, 3
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) 17
8 U.S.C. 1252 (Supp. V 1999) 1, 2, 5
8 U.S.C. 1252(a) (Supp. V 1999) 1
8 U.S.C. 1252(a)(1) (Supp. V 1999) 1, 3
8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) 2, 3, 9
8 U.S.C. 1252(b)(9) (Supp. V 1999) 1, 2
8 U.S.C. 1252(e)(2) (Supp. V 1999) 1, 2, 3
8 U.S.C. 1252(g) (Supp. V 1999) 13
8 U.S.C. 1254 (1994) 10
28 U.S.C. 2241 ..... 2, 4, 7, 8

Miscellaneous:

141 Cong. Rec. 15,069 (1995) 20
142 Cong. Rec. 7349 (1996) 3, 4
142 Cong. Rec. S11,886 (daily ed. Sept. 30, 1996) 20
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Miscellaneous—Continued: Page

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H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996) 11
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 10, 11
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 3
Lamar Smith & Edward Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883 (1997) 10-11

REPLY BRIEF FOR THE PETITIONER

A. *Jurisdiction.*

1. Congress has directed that "[j]udicial review of a final order of removal * * * is governed *only*" by the exclusive court-of-appeals review provisions of the Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (emphasis added). That rule, channeling all review of all final removal orders into the courts of appeals, is subject to only one narrow exception, not applicable here, which expressly identifies "habeas corpus" as the means of "judicial review" for cases falling within that exception. See 8 U.S.C. 1252(a)(1) and (e)(2) (Supp. V 1999) (referring to removal orders under 8 U.S.C. 1225(b)(1) (Supp. V 1999)). The clear import of Section 1252(a) is that—subject to that single exception—the validity of a final order of removal may be tested in the courts, if at all, only in a court of appeals, and only pursuant to the Hobbs Act's procedures, as modified by Section 1252. Congress has thereby precluded district court review of final removal orders, by habeas corpus or otherwise.

That conclusion is confirmed by 8 U.S.C. 1252(b)(9) (Supp. V 1999), which this Court in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 483 (1999), described as an "unmistakable 'zipper' clause," *ibid.*—*i.e.*, a clause that says "no judicial review in [removal] cases unless [Section 1252] provides judicial review," *id.* at 482. See Opening Br. 20-21. Respondent argues (Br. 17), however, that in *AADC* the Court did not comment on the "analytically distinct" question of whether Section 1252(b)(9) repealed habeas corpus jurisdiction for those situations in which there is no review in the courts of appeals. The question of the availability of review in a district court (whether by habeas corpus or otherwise) is not, however, analytically distinct from the channeling function of Section

1252(b)(9); it is, rather, at the core of the problem to which Section 1252(b)(9) is addressed. The very purpose of Section 1252(b)(9), as its sweeping language establishes, is to make clear that judicial review of any issue arising out of a removal proceeding is available, if at all, only in a court of appeals on petition for review, which necessarily precludes review in the district courts (by habeas corpus or otherwise). Section 1252(b)(9) provides that "*all* questions of law and fact, including interpretation and application of * * * statutory provisions, arising from *any* action taken or proceeding brought to remove an alien from the United States * * * shall be available *only* in judicial review of a final order under this section [*i.e.*, Section 1252]" (emphasis added). That language necessarily precludes district court review of the issue of statutory interpretation raised by respondent—whether the Attorney General properly denied him discretionary relief under former 8 U.S.C. 1182(c) (1994). And because 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against" an aggravated felon, judicial review of that question is also unavailable in the courts of appeals.[1]

Respondent argues (Br. 10-11) that Section 1252 does not expressly mention the general habeas corpus statute, 28 U.S.C. 2241, and so should not be read to preclude review of removal orders under that statute. But Congress did refer specifically to habeas corpus in Section 1252(e)(2), where it provided that, for removal orders entered in expedited-

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[1] Because Section 1252(a)(2)(C) says that "no court" shall have jurisdiction, that Section independently bars district court review in this case. And because Section 1252(a)(2)(C) applies "[n]otwithstanding *any* other provision of law" (emphasis added), it applies "notwithstanding" 28 U.S.C. 2241's provision for habeas corpus review—even if we assume, arguendo, that the other provisions of Section 1252 discussed above are insufficient to preclude district court review here.

removal proceedings under Section 1225(b)(1), "[j]udicial review * * * is available in habeas corpus proceedings." 8 U.S.C. 1252(e)(2) (Supp. V 1999). Congress thus specified the only circumstance in which "judicial review" of removal orders by habeas corpus is authorized, and it reconfirmed that point by making that circumstance an express exception to the otherwise flat rule of Section 1252(a)(1) requiring all "judicial review" to be had only in the courts of appeals.

Contrary to respondent's suggestion (Br. 10-11) that Congress did not focus on the consequences of precluding judicial review of aggravated felons' removal orders, the legislative history of Section 1252(a)(2)(C) makes clear that Congress fully anticipated that such orders would not be reviewable in court. See Gov't Br. at 18-21, *Calcano-Martinez* v. *INS*, No. 00-1011 (hereinafter Gov't *Calcano* Br.). Section 1252(a)(2)(C) originated in an amendment offered in committee by Senator Abraham, which was intended to "end the process" once a final removal order was entered by the Board of Immigration Appeals. See *id.* at 21. Senator Abraham stated on the Senate floor that his amendment would "end judicial review for orders of deportation entered against these criminal aliens while maintaining the right to administrative review." 142 Cong. Rec. 7349 (1996); accord S. Rep. No. 249, 104th Cong., 2d Sess. 14, 27 (1996) (provision "eliminates" judicial review); *id.* at 40 (additional views of Sen. Abraham). And he explained that aggravated felons would have full access to habeas corpus to challenge their underlying criminal convictions, but would not have any right of judicial review of the final orders of removal subsequently entered on the basis of such convictions:

> These reforms would not affect any of the aliens' due process protections on the underlying criminal offense. Aliens would still be entitled to the lengthy appellate and habeas corpus review, just like U.S. citizens. But

> abuses of the appeals process would stop there and not continue on through the deportation provisions themselves.

142 Cong. Rec. at 7349. Senator Abraham thus made clear that, under his amendment, the only "habeas corpus review" aliens would thenceforth have would be review of the criminal convictions that formed the basis for their removal orders, and not the removal orders themselves.

2. Respondent relies (Br. 11) on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to argue that the district courts must retain habeas corpus jurisdiction over a particular kind of claim unless Congress states *in haec verba* that the courts' jurisdiction under 28 U.S.C. 2241 over that claim has been precluded. Neither decision supports that proposition. Both cases involved statutes that restricted this Court's statutory authority to review by appeal or certiorari decisions of the lower federal courts denying a writ of habeas corpus. See *Felker*, 518 U.S. at 659-661. In both cases, however, Congress had not also restricted the Court's separate statutory authority to entertain habeas corpus petitions filed directly in this Court.[2] In *Felker* and *Yerger*, the Court declined to read Congress's restriction in the former statutory source of its jurisdiction over into the latter by implication.[3]

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[2] Although referred to as "original" petitions, such petitions are for purposes of Article III of the Constitution an exercise of the Court's appellate jurisdiction over lower courts' decisions denying habeas corpus petitions. See *Felker*, 518 U.S. at 659-661; *id.* at 667 n.1 (Souter, J., concurring); *Yerger*, 75 U.S. (8 Wall.) at 97-98; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807) (Court's authority under Judiciary Act of 1789 to issue writ of habeas corpus was appellate in nature).

[3] Contrary to respondent's suggestion (Br. 11 n.5), neither *Felker* nor *Yerger* involved a categorical, across-the-board statutory preclusion of all jurisdiction (or all habeas corpus jurisdiction) over the kind of claim that the petitioner sought to raise in those cases. Thus, the Court asserted

By contrast, in IIRIRA, Congress placed *all* of the courts' authority to review removal orders in one place, Section 1252, and made clear as a categorical matter in that very same place that all such review must proceed only in the court of appeals, except as otherwise provided in Section 1252 itself. No "implication" is necessary to conclude that district court jurisdiction to review removal orders (by habeas corpus or otherwise) has been precluded.

3. Even before it enacted IIRIRA, Congress had eliminated the district courts' jurisdiction to review deportation orders on habeas corpus when it enacted Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268. See Opening Br. 26; Gov't *Calcano* Br. 19. AEDPA Section 401(e), entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed former 8 U.S.C. 1105a(a)(10) (1994), which had expressly preserved the writ of habeas corpus for aliens held in custody under deportation orders.

Respondent maintains (Br. 12-15) that former Section 1105a(a)(10) was not necessary to preserve habeas corpus review, because Section 1105a(a) by itself, without subsection (a)(10), would not have ousted that jurisdiction. But the text of Section 1105a(a), without subsection (a)(10), plainly *would* have ousted all district court jurisdiction, for Section 1105a(a) provided that the "sole and exclusive" avenue for review of deportation orders was by petition for review in the court of appeals. Indeed, subsection (a)(10), which preserved habeas corpus in district court for aliens actually held in custody, was one of a number of express "except[ions]" to

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jurisdiction over Felker's original habeas corpus petition (see p. 4 n.2, *supra*) because Congress had precluded the Court's jurisdiction *only* with respect to review by appeal or certiorari, and not over original petitions. For that reason, while the Court dismissed the certiorari petition for want of jurisdiction, it denied the "petition for an original writ of habeas corpus" on the merits. 518 U.S. at 665.

the general rule that judicial review was governed by the Hobbs Act, see *Stone* v. *INS*, 514 U.S. 386, 393 (1995)—thereby making clear on the face of the statute that the general rule would have governed in the absence of that "except[ion]." The legislative history, moreover, confirms that subsection (a)(10) was enacted in response to concerns that Section 1105a(a) otherwise would have unconstitutionally suspended habeas corpus. See Opening Br. 5-6.[4]

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[4] Respondent argues (Br. 13-14) that Congress's principal purpose in enacting Section 1105a(a) was to eliminate judicial review of exclusion and deportation orders by declaratory judgment action brought under the Administrative Procedure Act (APA), and that Congress did not intend to eliminate aliens' access to habeas corpus. We of course do not suggest that Congress in 1961 intended to eliminate aliens' access to habeas corpus; rather our point is that Congress enacted Section 1105a(a)(10) precisely because it did not intend to eliminate such access, and because Section 1105a(a), without subsection (a)(10), would have had that effect.

In arguing to the contrary, respondent notes (Br. 14 n.7) that, although Representative Walter had, at a hearing in April 1958, expressed concern that legislation providing for exclusive review of all claims arising out of deportation orders in one proceeding might be unconstitutional because it would not leave habeas corpus available (see Opening Br. 5 n.2), he introduced a bill in May 1958 that provided for exclusive review of deportation orders in the courts of appeals, without an express exception for habeas corpus. It is not clear why his bill did not contain such an express exception, but he was aware (as his comment at the 1958 hearing referring to the President's proposed legislation demonstrates) that the Eisenhower Administration had already proposed legislation that would have occupied the field of judicial review of deportation orders. That legislation would have provided that, "[n]otwithstanding the provisions of the [APA] or any other law," the district courts would have had jurisdiction to review challenges to deportation orders "only as provided in this subsection," and would also have expressly preserved habeas corpus review for aliens held in custody. See H.R. 9182, 84th Cong., 2d Sess. § 203(a)(1) (1956); H.R. 11167, 85th Cong., 2d Sess. § 29 (1958). Representative Walter may well have expected that the approaches of the two bills would be melded, which is exactly what happened.

Respondent suggests (Br. 16 & n.9) that when Congress repealed Section 1105a(a)(10) in AEDPA Section 401(e), Congress might have intended only to clarify that the district court's habeas corpus jurisdiction to review deportation orders would thenceforth rest only on 28 U.S.C. 2241 itself, and not also on Section 1105a(a)(10) (which, respondent suggests, might have provided broader review than 28 U.S.C. 2241). But the case law predating AEDPA does not suggest any significant confusion in the courts on whether habeas corpus jurisdiction to review deportation orders arose under Section 1105a(a)(10), 28 U.S.C. 2241, or both.[5] The courts of appeals that engaged in a reasoned discussion of the issue either indicated that the district court's habeas corpus jurisdiction arose under Section 1105a(a)(10),[6] or recognized that, even if 28 U.S.C. 2241 were the source of the district court's jurisdiction, Section 1105a(a)(10) preserved that jurisdiction in light of Section 1105a(a)'s otherwise unqualified language requiring review of all deportation orders to be in the courts of appeals.[7] No court of appeals

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[5] There was disagreement in the courts of appeals about the *kinds* of challenges to final deportation orders that might be raised in the district courts on habeas corpus, as opposed to direct review of a deportation order in the court of appeals. Compare *Daneshvar* v. *Chauvin*, 644 F.2d 1248, 1250 (8th Cir. 1981) (habeas corpus available only to review denial of stay of deportation, and not merits of deportation order), with *United States ex rel. Marcello* v. *District Director*, 634 F.2d 964, 971 (5th Cir. 1981) (plenary review of merits of deportation order available on habeas corpus), and *Galaviz-Medina* v. *Wooten*, 27 F.3d 487, 491 (10th Cir. 1994) (only limited review of merits of deportation order on habeas corpus), cert. denied, 513 U.S. 1086 (1995). To the extent that AEDPA Section 401(e)'s repeal of Section 1105a(a)(10) might be seen as resolving that conflict, it did so by eliminating district court review altogether.

[6] *Galaviz-Medina*, 27 F.3d at 489-491; *Marcello*, 634 F.2d at 966-970.

[7] *Garay* v. *Slattery*, 23 F.3d 744, 745 (2d Cir. 1994) (noting that "[t]he second avenue for judicial review of a deportation proceeding is provided

held that a district court had habeas corpus jurisdiction to review the merits of a deportation order only 28 U.S.C. Section 2241, without regard to the preservation of habeas corpus in Section 1105a(a)(10).[8] Especially against this background of the clear text of Section 1105a(a) and the case law construing it, the obvious purpose and effect of Congress's enactment of AEDPA Section 401(e)—which amended Section 1105a(a) by "striking" subsection (a)(10)—were to terminate the availability of habeas corpus review that subsection (a)(10) had theretofore preserved. If there could be any remaining doubt on that score, however, it is removed by the heading of AEDPA Section 401(e), which confirms that that Section accomplished the "ELIMINATION" of review by habeas corpus.[9]

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in [Section 1105a(a)(10)]" but citing a case referring to habeas corpus jurisdiction under 28 U.S.C. 2241).

[8] In *Sotelo Mondragon* v. *Ilchert*, 653 F.2d 1254 (9th Cir. 1980), cited by respondent (Br. 16 n.9), the court first stated (653 F.2d at 1255) that "[t]he district court had jurisdiction to review the deportation order under [then] 8 U.S.C. § 1105a(a)(9) and 28 U.S.C. § 2241," but subsequently noted (653 F.2d at 1256) that the court of appeals had exclusive jurisdiction to review deportation orders "unless the review is had by habeas corpus under § 1105a(a)(9)." In *Orozco* v. *INS*, 911 F.2d 539 (11th Cir. 1990), also cited by respondent (Br. 16 n.9), the court stated that "[c]hallenges to deportation proceedings are cognizable under 28 U.S.C. § 2241," see 911 F.2d at 541 (citing *Marcello*, *supra*), but did not address the relation between that provision and Section 1105a(a)(10). Moreover, that statement by the court is not inconsistent with our submission, which is that the express exception in Section 1105a(a)(10) was necessary to preserve that habeas corpus jurisdiction, in light of the opening paragraph of Section 1105a(a).

[9] See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."); see also *Knowlton* v. *Moore*, 178 U.S. 41, 65 (1900); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818).

4. Respondent argues (Br. 18-19) that our submission that Congress has required all judicial review of removal orders to proceed only in the courts of appeals, and not at all in the district courts, is at odds with the position taken by the government in briefs in opposition to certiorari petitions presenting a similar issue arising under AEDPA Section 440(a), 110 Stat. 1276-1277—which, like Section 1252(a)(2)(C) (added later by IIRIRA), precluded judicial review of challenges to deportation orders by aggravated felons. In those opposition briefs, however, we did not argue that the district courts would have had jurisdiction over habeas corpus petitions filed by the petitioner aliens; rather, we pointed out that the courts of appeals had not yet addressed that issue, because the aliens in those cases had filed only petitions for review, and not habeas corpus petitions. We subsequently argued in this Court that, in both AEDPA and IIRIRA, Congress had required that all challenges to deportation orders proceed only in the courts of appeals. See Pet. at 14-24, *Reno* v. *Goncalves*, 526 U.S. 1004 (1999) (No. 98-835).[10]

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[10] Respondent suggests (Br. 10 n.4) that, if judicial review of the claim he raises would have been available in the court of appeals, it would be unfair to close the district court to his challenge now because, when he filed his habeas corpus petition, Second Circuit precedent indicated that a challenge to a deportation order against an aggravated felon that did not involve the alien's deportability could proceed *only* in the district court, and not in the court of appeals. That Second Circuit decision involved not the permanent provisions for judicial review of removal orders under IIRIRA, but rather AEDPA and IIRIRA's transition rules for judicial review of old deportation orders. *Henderson* v. *INS*, 157 F.3d 106 (1998), cert. denied, 526 U.S. 1004 (1999).

Should the Court conclude, however, that it would have authority to reach the merits of respondent's challenge in this case arising on habeas corpus in the district court, even though Congress has generally precluded that avenue of judicial review, and that for reasons of fairness it would be appropriate to do so, cf. *Turkhan* v. *Perryman*, 188 F.3d 814, 822 (7th Cir. 1999); *Singh* v. *Reno*, 182 F.3d 504, 510-511 (7th Cir. 1999), the Court

B. *Merits.*

1. When Congress enacted IIRIRA, it effectuated a "fundamental re-orientation of immigration policy." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 110 (1996). Congress was convinced that the pre-IIRIRA system of administrative and judicial review had failed to accomplish the deportation of numerous criminal aliens, see *id.* at 118-120, and that aliens had also abused opportunities to seek discretionary relief from deportation, see *id.* at 121-122. In IIRIRA, Congress started anew. It eliminated the old deportation and exclusion proceedings and replaced them with "a single, streamlined 'removal proceeding'" (*id.* at 158). It also eliminated both relief under old 8 U.S.C. 1182(c) (1994) and "suspension of deportation" under old 8 U.S.C. 1254 (1994) and replaced them with the new "cancellation of removal" provisions, with tightened restrictions on the Attorney General's authority to grant relief (see H.R. Rep. No. 469, Pt. 1, *supra*, at 231-232). One of IIRIRA's principal authors aptly described these new provisions as a "complete restructuring" of the Immigration and Nationality Act (INA). See Lamar Smith & Edward Grant, *Immigration Reform:*

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should reject that challenge on the merits (for the reasons given in our opening brief at 32-49 and in this reply brief at 10-20) and should therefore reverse the judgment of the court of appeals. Respondent suggests (Br. 10 n.4) that the Court remand this case to the court of appeals to decide whether his claim should be entertained notwithstanding the general preclusion of district court review. Because of the importance of the merits question in this case if it is subject to judicial review at all, we urge the Court to decide whether the question may be appropriately addressed in a district court habeas corpus proceeding in the circumstances of this case. If the Court were to conclude that the merits issue can be addressed in this case, the Court could then resolve it and thereby put an end to litigation of that question in the lower courts.

Seeking the Right Reasons, 28 St. Mary's L.J. 883, 915 (1997).[11]

Respondent maintains, however (Br. 31-32), that this "complete restructuring" should be applied to his case only piecemeal. Respondent does not dispute that it was entirely proper for the INS to commence removal proceedings against him under post-IIRIRA law. He nonetheless argues that the Attorney General must apply to his case one provision of prior law that was repealed by IIRIRA, Section 1182(c), despite Congress's clear intent to "replace" Section 1182(c) by IIRIRA's new provision for cancellation of removal. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996). That contention is contrary to the categorical rules Congress laid down for applying the amendments made by Title III-A of IIRIRA.

Section 309(a) of IIRIRA, 110 Stat. 3009-625, establishes a generally applicable effective date for Title III-A, specifying (with certain exceptions inapplicable here) that Title III-A and the amendments made by it "shall take effect" on the first day of the month beginning more than 180 days from the date of enactment of IIRIRA (April 1, 1997), which Section 309(a) refers to as the "title III-A effective date." Respondent contends that the mere specification of an effective date of a new law does not mean that it applies to conduct that occurred before that effective date. See Br. 28 (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 257, 259 (1994)). Section 309(a) does not, however, stand alone. Section 309(c) makes clear that the operative event for purposes of applying its effective date is the date on which administrative proceedings are instituted against the alien. Section

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[11] See also H.R. Rep. No. 469, Pt. 1, *supra*, at 230-233 (summarizing changes made to administrative proceedings under the INA by IIRIRA Section 304); *id.* at 237-238 (changes made to judicial-review provisions of the INA by IIRIRA Section 306).

309(c)(1) states that, subject to certain exceptions in succeeding provisions of Section 309(c), in the case of an alien who is in exclusion or deportation proceedings as of the "title III-A effective date," "(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." 110 Stat. 3009-625. It follows that the amendments made by Title III-A *do* apply to aliens against whom administrative proceedings were instituted on or after the Title III-A effective date.

Respondent asserts (Br. 29-30) that this rule established by Sections 309(a) and (c)(1) for determining the application of Title III-A governs only the new "procedural" rules in Section 304(a) of IIRIRA. That assertion is contrary to the text of both Section 309(a), which establish a generally applicable "title III-A effective date," and Section 309(c)(1), which specifies the category of cases to which all of "the amendments made by this subtitle" (not merely "procedural" amendments or amendments contained in Section 304(a)) "shall not apply"—namely, cases commenced before that effective date. That assertion also is contrary to this Court's understanding of Title III-A's effective date provisions. In *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999), this Court relied upon Sections 309(a) and (c) in concluding that the *substantive* statutory provisions governing withholding of removal that were enacted in *Section 305* of IIRIRA were inapplicable in a case in which administrative proceedings were commenced before April 1, 1997.[12]

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[12] Respondent also asserts (Br. 32) that Congress "likely did not intend" that the application of the amendments made by IIRIRA would depend on when the INS decided to institute proceedings against an alien. Respondent's assertion that Congress would not have intended to make the applicability of the new statutory provisions turn on an administrative determination is refuted by Sections 309(c)(2) and (3) of IIRIRA, 110 Stat. 3009-626, which expressly confer on the Attorney General the option to

Furthermore, as Judge Walker observed in dissent below, the "awkward statutory patchwork" that would result from the piecing together of old and new provisions that respondent proposes "reveals Congress could not have intended" such a conclusion. Pet. App. 37a. The far more sensible reading of IIRIRA—and the one dictated by the text of Section 309 and the structure of Title III-A as a whole—is that Congress intended that all aspects of the comprehensive and interrelated revisions made by Title III-A would be applied together in all removal proceedings commenced on or after Title III-A's date, and that none of them would be applied in any proceedings commenced before that date, *except* where Congress expressly so provided, as it did in a few instances.[13] Because that intent is clear, Congress was not required (as respondent evidently maintains, see Br. 23-26) to state *in haec verba* that "the repeal of Section 1182(c) shall apply in all cases commenced under the Title III-A amendments, regardless of the date of the alien's conviction," in order to accomplish that result.

2. Respondent notes (Br. 24-27) that Congress expressly provided that certain provisions in separate titles of IIRIRA that turn on an alien's conduct or conviction are to be applied

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proceed under the INA as amended by Title III-A of IIRIRA even in cases that were commenced prior to the general Title III-A effective date and that otherwise would be governed by pre-IIRIRA law.

[13] See, *e.g.*, IIRIRA § 306(c)(1), 110 Stat. 3009-612 (providing that new 8 U.S.C. 1252(g) (Supp. V 1999), added by IIRIRA Section 306(a), "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings"; see *AADC*, 525 U.S. at 477); IIRIRA § 309(c)(4), 110 Stat. 3009-626 (directing application of certain transition rules for judicial review of final deportation and exclusion orders entered more than 30 days after enactment of IIRIRA); IIRIRA § 309(c)(5), 110 Stat. 3009-627 (directing that new "stop-time" rule terminating period of continuous physical presence for eligibility for suspension of deportation, added by IIRIRA Section 304, be applied to cases commenced "before, on, or after the date of the enactment" of IIRIRA).

regardless of the date of that conduct or conviction, and finds significance in the fact that Congress made no such express statement about the repeal of Section 1182(c). Even the court of appeals realized, however, that no negative inference could be drawn from those widely varying provisions in other titles of IIRIRA about Congress's intent as to the temporal applicability of the repeal of Section 1182(c) in Title III-A. See Pet. App. 21a n.5. As we have explained (Opening Br. 37 & n.19), the other provisions of IIRIRA on which respondent relies had different origins in the legislative process and address widely disparate subject matters, and so no negative inference can be drawn from the absence of a similar express provision in IIRIRA Section 304. Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999).[14]

Moreover, the other titles of IIRIRA in which those provisions appear do not establish an integrated, comprehensive framework similar to that established by Title III-A's enactment of the new removal procedures. Congress therefore would not necessarily have expected that the courts would have treated (for example) the provisions in Title III-B as an integral whole, in the way that it plainly anticipated the courts would treat all the provisions of Title III-A. Because there is no specific provision directing

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[14] Respondent notes (Br. 27 n.22) that three provisions in Title III-A are governed by specific temporal-scope provisions. Two of those provisions, however, create exceptions to the otherwise broad rule that all of Title III-A is to be applied together to all cases commenced after its effective date, and thus reinforce our submission that the rest of Title III-A is to be applied together. See IIRIRA § 301(b)(3), 110 Stat. 3009-578 (period of alien's previous unlawful presence in United States before Title III-A's effective date is excluded in determining whether alien is inadmissible); IIRIRA § 301(c)(2), 110 Stat. 3009-579 (proof requirements of provisions making admissible battered women and children not applicable if alien first arrived in United States before effective date). The third provision, IIRIRA Section 306(d), 110 Stat. 3009-612, addressed transition cases involving the application of AEDPA Section 440 to criminal aliens.

the temporal applicability of Title III-B, Congress understandably found it prudent to be especially precise about the temporal applicability of particular provisions in Title III-B. For example, Congress may well have explicitly provided that the expanded definition of "aggravated felony" enacted in Title III-B (see IIRIRA § 321, 110 Stat. 3009-627 to 3009-628) is to be applied regardless of the date of the alien's conviction in order to avoid litigation (with attendant delay) over the question whether the application of the expanded definition in immigration proceedings implicates the presumption against retroactivity (or whether, as we have argued, matters relating to the removability of an alien are inherently prospective in nature).[15] By contrast, as Section 309 confirms, Congress clearly intended that all of the amendments made by Title III-A, including IIRIRA Section 304's repeal of old Section 1182(c), are to be applied together in all removal proceedings commenced on or after April 1,

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[15] Congress in 1988 made a conviction for an aggravated felony a ground of deportability (see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469) and in 1990 barred the Attorney General from granting relief under Section 1182(c) to aliens who had been convicted of aggravated felonies and had served at least five years in prison for such offenses (see Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052). Several aliens who were convicted of offenses before those enactments argued that those changes in the law should not be applied to their cases because such application would contravene the presumption against retroactivity. The courts of appeals rejected those contentions, ruling under the second step of the *Landgraf* analysis that changes in the bases on which an alien may be deported or denied discretionary relief from deportation are inherently prospective and thus do not have a retroactive effect within the meaning of *Landgraf*. See *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996); *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *De Osorio* v. *INS*, 10 F.3d 1034, 1042 (4th Cir. 1993). By making the expanded definition of aggravated felony in IIRIRA expressly applicable to past convictions, Congress may have simply intended to avoid similar litigation over the temporal applicability of that new definition.

1997. There was therefore no need for Congress to address further the temporal scope of specific amendments made by Section 304.[16]

3. Because it is clear that Congress deprived the Attorney General of authority to grant relief under Section 1182(c) to any alien placed in removal proceedings on or after April 1, 1997, there is no need for the Court to address whether that restriction on the Attorney General's authority is "retroactive," within the meaning of the Court's decision in *Landgraf*, 511 U.S. at 280, when applied to cases like this. If the Court reaches that issue, it should conclude that that restriction presents no retroactivity concerns, even as applied in the cases of aliens who pleaded guilty before IIRIRA was enacted. As we have explained (Opening Br. 37-41), the Nation's immigration laws have always operated on the premise that those laws regulate an alien's *future* status and eligibility to remain in the United States, in light of Congress's most recent determination about the classes of aliens whose ongoing presence in the United States is beneficial or contrary to the national interest. While statutory provisions rendering an alien removable or ineligible for discretionary relief from removal may turn on an alien's past conduct, those provisions do not operate as

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[16] In addition, Congress's significant expansion of the definition of "aggravated felony" in IIRIRA Section 321, and its express command that that definition be applied to prior convictions, seriously undermine respondent's submission (Br. 32-33) that Congress could not have expected that its repeal of Section 1182(c) in IIRIRA Section 304 would result in the removal of numerous aliens who otherwise might not have been removed. Congress was obviously aware that, by defining crimes as aggravated felonies that were not so categorized before IIRIRA, it was rendering many aliens subject to removal who were not previously removable, even though their criminal convictions became final before IIRIRA. And that is true even if the alien had pleaded guilty before IIRIRA was enacted and had at that time expected that his criminal conviction would not render him removable.

punishment for that conduct, but rather establish that the aliens' continued presence here is contrary to the public interest. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924).[17]

Respondent argues (Br. 47) that this Court's decisions upholding the constitutional power of Congress to alter the bases on which aliens may be deported are irrelevant to the statutory question whether such alterations are "retroactive" under *Landgraf*. Respondent overlooks the fundamental reasons why this Court has upheld Congress's power to change the status of classes of aliens. As the Court has explained, "any policy toward aliens is vitally and intricately interwoven with *contemporaneous policies*" with respect to other nations and immigration as a whole. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (emphasis added). When Congress determines that a class of aliens not previously removable should thenceforth be subject to removal,

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[17] We have also noted (Opening Br. 39-40) that, in *AADC*, 525 U.S. at 491, the Court stated that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law," thus reaffirming that removal constitutes an evaluation of the alien's future right to be in the United States, not a punishment for his past conduct. Respondent argues (Br. 45 n.36) that that observation by the Court in *AADC* is inapposite here because respondent was a lawful permanent resident (LPR) alien who was entitled to remain here until ordered removed. For several reasons, that submission is incorrect. First, two of the respondents in *AADC* were LPRs, see 525 U.S. at 474, and so the Court must have understood its observation to refer to LPRs as well as other aliens. Second, the Court specifically stated in *AADC* that "in all cases" deportation brings a continuing violation to an end. *Id.* at 491. Third, the continuing presence in the United States of an LPR alien who is removable because he is an aggravated felon is no less an "ongoing violation of United States law" than is the continuing presence here of a non-LPR alien who has overstayed his visa or gained entry without proper documentation. "Any alien who is convicted of an aggravated felony at any time after admission is deportable," 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999), and so his presence in the United States violates federal law.

it is acting not to punish those aliens for past conduct but rather to carry out its evaluation of the current national interest in immigration. And when Congress requires "the deportation of aliens whose presence in the country it deems hurtful," its action is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).[18]

Respondent maintains (Br. 34-39), however, that the application of IIRIRA's repeal of Section 1182(c) to his case would be "retroactive" because it would impair his "reasonable reliance" and "settled expectations" when he pleaded guilty that he would remain eligible to apply for relief from deportation. That argument misconceives the inquiry that the courts undertake in determining whether a statute is to be applied based on events that predate its enactment. "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. A critical assumption underlying a conclusion of statutory interpretation that a statute is "retroactive" must be that the statute actually regulates the past events in question, and not "merely [that] it draws upon antecedent facts for its operation." *Id.* at 270 n.24 (internal quotation marks omitted). IIRIRA, however, does not regulate, or "attach[] new legal consequences" to a

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[18] Contrary to respondent's contention (Br. 45-46), *Chew Heong* v. *United States*, 112 U.S. 536 (1884), does not stand for the proposition that a change in the grounds for removal (much less discretionary relief from removal) triggers a presumption against retroactivity. As we explain in our opening brief (at 40-41 n.22), the Court's decision in that case turned on the fact that the alien had a vested treaty right to return to the United States without being subjected to regulations that would impair the substance of that right. The typical removal case involves no such vested right derived from an independent source. Compare Opening Br. 43-46; p. 20, *infra* (explaining that Congress has never framed the opportunity for relief under Section 1182(c) as a "right" of the alien).

guilty plea as such, or in the sense that phrase was used in *Landgraf*.

First, neither IIRIRA nor the INA more generally mentions guilty pleas as a basis for any treatment of the alien, and such pleas in any event are the product of tactical judgments in litigation, see *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970), not the sort of primary conduct to which retroactivity analysis might apply in other settings.[19] While respondent might have had a hope that he would be granted relief in the Attorney General's discretion, he manifestly had no right to such relief, especially in light of the serious nature of his offenses. See Gov't *Calcano* Br. 6 n.5 (noting that aliens convicted of drug-trafficking crimes could not, under BIA case law, obtain Section 1182(c) relief unless they showed "unusual or outstanding equities").

Second, the Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment * * * or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted); see, *e.g.*, *Kansas* v.

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[19] Respondent intimates that IIRIRA's repeal of Section 1182(c) would be retroactive if that repeal were applied in the case of any alien who committed an aggravated felony (or perhaps was convicted of an aggravated felony) before IIRIRA's enactment, whether or not the alien pleaded guilty. See Br. 37 (arguing that an alien "is entitled to notice of a change in immigration liability resulting from his behavior," including "the deportation consequences of criminal convictions"). No court of appeals, however, has endorsed that broad proposition, and even the court of appeals in this case squarely rejected the notion that "barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct—as opposed to a plea going to the guilt of a deportable crime—constitutes an impermissible retroactive application of a statute." Pet. App. 25a. The court noted that it would "border on the absurd to argue" that these aliens might have decided not to commit their crimes if they had known, not only that they would be subject to removal, but they would be ineligible for discretionary relief from removal, upon conviction. *Ibid.*

Hendricks, 521 U.S. 346, 370-371 (1997) (new statute providing for involuntary commitment of person previously convicted of sexually violent offense who has a mental abnormality and is dangerous to community not "retroactive" because it operates on the basis of the person's *current* suitability to be in the community). The possibility of being granted discretionary relief under Section 1182(c), we have noted (Opening Br. 43-46), was never framed as a right of the alien but rather as a power of the Attorney General to be exercised in his unfettered discretion, and Congress has now limited that power. The "relevant activity" that IIRIRA's repeal of Section 1182(c) "regulates" is the decision of the Attorney General whether to grant relief under that provision, not the criminal conduct or conviction of an alien who might apply for that relief.[20] The power to grant relief from removal must inevitably be exercised in the future, and it is the prospective exercise of that power that Congress has regulated and restricted in IIRIRA. Accordingly, application of IIRIRA's repeal of the Attorney General's power to grant relief under Section 1182(c) in respondent's removal proceeding is not "retroactive" under *Landgraf*.

* * * * *

For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[20] See *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment); see also 142 Cong. Rec. S11,886 (daily ed. Sept. 30, 1996) (Sen. Abraham) (purpose of restriction and elimination of Section 1182(c) relief in AEDPA and IIRIRA was to end perceived abuses by immigration judges in too freely granting relief); *id.* at S12,295 (daily ed. Oct. 3, 1996) (Sens. Hatch and Abraham) (same); 141 Cong. Rec. 15,069 (1995) (Sen. Kennedy) (parallel provision in AEDPA "virtually eliminates the Attorney General's flexibility to grant discretionary relief from deportation for long-term permanent residents convicted of lesser crimes").

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IN THE

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ENRICO ST. CYR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici Curiae will address only the following question presented:

Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE CANON OF CONSTITUTIONAL DOUBT IS MISAPPLIED WHEN USED TO THWART THE EVIDENT INTENT OF CONGRESS	7
II. CONGRESS PLAINLY INTENDED TO REMOVE HABEAS JURISDICTION FROM DISTRICT COURTS IN CASES WHERE A REMOVAL ORDER HAS BEEN ISSUED AGAINST AN ALIEN WHO HAS COMMITTED AN AGGRAVATED FELONY	10
III. THE SUSPENSION CLAUSE IS NOT INFRINGED BY CONGRESS'S ELIMINATION OF DISTRICT COURTS' HABEAS CORPUS JURISDICTION IN CASES INVOLVING THE REMOVAL OF FELONIOUS ALIENS	13
A. Suspension Clause	14
B. Immigration	18
C. Article III	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

Cases:

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 8
Bounds v. *Smith*, 430 U.S. 817 (1977) 17
Calcano-Martinez v. *Reno*, 232 F.3d 328 (2d Cir. 2000) 4–5, 7, 13, 16
Carlson v. *Landon*, 342 U.S. 524 (1952) 18, 19
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 15
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 8, 10
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988) 9
Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) 14, 15, 16
Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) .. 5
Felker v. *Turpin*, 518 U.S. 651 (1996) 5, 17
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 18–19
Foti v. *INS*, 375 U.S. 217 (1963) 22
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 18, 19
INS v. *Doherty*, 502 U.S. 314 (1992) 22
INS v. *Elramly*, 518 U.S. 1051 (1996) 1
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) ... 16
Kuhlmann v. *Wilson*, 477 U.S. 436 (1986) 16
Landon v. *Plasencia*, 459 U.S. 21 (1982) 19–20
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 18
McIntyre v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) 17
Miller v. *French*, 530 U.S. 327 (2000) 8–9
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 21
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 20
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 21
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 8

TABLE OF AUTHORITIES—Continued

	Page
Preiser v. *Rodriguez*, 411 U.S. 475 (1973)	14
Ogbomon v. *United States*, 519 U.S. 1073 (1997)	1
Reno v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999)	1, 11, 12, 19
Reno v. *Flores*, 507 U.S. 292 (1993)	18
Sanders v. *United States*, 373 U.S. 1 (1963)	16
Swain v. *Pressley*, 430 U.S. 372 (1977)	16–17
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	17
United States ex rel. Attorney General v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909)	7
United States ex rel. Eichenlaub v. *Shaughnessy*, 338 U.S. 521 (1950)	21
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103 (1927)	20
United States v. *MacCollom*, 426 U.S. 317 (1976)	16
Woodby v. *INS*, 385 U.S. 276 (1966)	20
Yang v. *INS*, 109 F.3d 1185 (7th Cir. 1997)	10,12, 21, 23
Zadvydas v. *Underdown*, No. 99-7791 (argued Feb. 21, 2001)	1

Constitutional and Statutory Provisions:

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)	*passim*
IIRIRA § 306(b), 110 Stat. 3009-612	2, 10, 12
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1366-77 (1996)	8–9
8 U.S.C. § 1105a	2, 10
8 U.S.C. § 1227(a)(2)(A)(iii)	2
8 U.S.C. § 1229b(a)(3)	2
8 U.S.C. § 1229b(b)(1)(C)	2
8 U.S.C. § 1252	2
8 U.S.C. § 1252(a)(1)	2
8 U.S.C. § 1252(a)(2)	3
8 U.S.C. § 1252(a)(2)(C)	3, 4, 6, 11

TABLE OF AUTHORITIES—Continued

Page

8 U.S.C. § 1252(b)(9) 3, 11
18 U.S.C. § 3626(e)(2) 8
18 U.S.C. § 3626(e)(3) 8
28 U.S.C. § 2241 ..... 4, 5, 11, 12, 16, 17
U.S. Const. art. I, § 8 (naturalization) 18
U.S. Const. art. I, § 8 (inferior courts) 21
U.S. Const. art. III, § 1 ..... 14, 21
U.S. Const. art. I, § 9 (Suspension Clause) ..... *passim*

Miscellaneous:

William Blackstone, Commentaries 15
Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 14–15, 21
Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, (1989) 17
Joseph Story, Commentaries on the Constitution of the United States (Carolina Academic Press 1987) (abridged ed., 1833) 14

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appears in legal proceedings before federal and State courts to combat illegal immigration and to ensure that aliens who commit crimes are excluded from American society. *See, e.g.*, *Zadvydas* v. *Underdown*, No. 99-7791 (argued Feb. 21, 2001); *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999); *Ogbomon* v. *United States*, 519 U.S. 1073 (1997); *INS* v. *Elramly*, 518 U.S. 1051 (1996). WLF submits this brief in support of Petitioner and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari filed by the United States. In addition, we wish to emphasize certain aspects of the record.

Enrico St. Cyr is a citizen of Haiti who entered this country legally in 1986 but who, in 1996, "pleaded guilty in Connecticut state court to the sale of a controlled substance." U.S. Pet. 9. In 1997 the Immigration and Naturalization Service (INS) began formal proceedings to remove St. Cyr from the country because of his conviction for drug trafficking. *See id.*

Before the removal proceedings against St. Cyr commenced, an Act of Congress dramatically changing

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

federal immigration law took effect. As characterized by the United States, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) was one of two statutory reforms "designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders." *See* U.S. Pet. 2. Under IIRIRA a resident alien convicted of an aggravated felony is subject to removal. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Indeed, IIRIRA declares such aliens *categorically* ineligible for discretionary relief. *Id.* at §§ 1229b(a)(3), 1229b(b)(1)(C).

Besides these changes in the substantive law governing eligibility for discretionary relief, IIRIRA reshaped the procedural landscape for criminal aliens seeking relief from a final removal order. IIRIRA repealed 8 U.S.C. § 1105a, which had formerly vested district courts with jurisdiction to grant the writ of habeas corpus to aliens detained pending removal. IIRIRA § 306(b), 110 Stat. 3009-612. In its place IIRIRA enacted a new provision, 8 U.S.C. § 1252, which directs that judicial review of final removal orders is available only on petition for review in the courts of appeals. *See* 8 U.S.C. § 1252(a)(1). To this restriction on judicial review Congress added the following:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available

> only in judicial review of a final order under this section . . . .

Id. at § 1252(b)(9). To cap it off, under the heading of "Matters not subject to judicial review," *Id.* at § 1252(a)(2), IIRIRA further restricted the scope of judicial review by making it unavailable to aliens ordered removed because of the commission of an aggravated felony:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony] . . . .

Id. at § 1252(a)(2)(C).

In spite of these substantive and procedural hurdles, St. Cyr sought discretionary relief. At his administrative hearing he argued that he was entitled to discretionary relief, despite the fact that Congress had since repealed the statutory provision on which he relied. *See* U.S. Pet. 9. The immigration judge declined, ordering St. Cyr removed to Haiti. *Id.* St. Cyr nonetheless pressed the same argument before the Board of Immigration Appeals (BIA), which affirmed. *Id.* BIA underscored that IIRIRA renders St. Cyr "'statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony.'" U.S. Pet. App. 95a.

Unwilling to concede defeat, St. Cyr filed a petition for habeas corpus in district court. U.S. Pet. 10. There he continued to maintain his eligibility for discretionary relief. *Id.* This time his persistence paid off. The district court accepted his argument that

IIRIRA did not divest it of habeas jurisdiction because St. Cyr's felony conviction was entered before IIRIRA's effective date. *See id.* Finding that it had jurisdiction, the court ruled against the government on the merits and entered an order "directing the BIA to entertain [St. Cyr's] application for relief under the repealed Section 1182(c)." *Id.*

The government appealed to the Second Circuit, which affirmed. In reaching its decision, the majority claimed to be merely following its decision in *Calcano-Martinez* v. *Reno*, 232 F.3d 328 (2d Cir. 2000). There the same panel that issued the decision below had held that IIRIRA failed to "divest [district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available." U.S. Pet. App. 6a.

The court arrived at this destination in three stages. First, citing 8 U.S.C. § 1252(a)(2)(C), it held that IIRIRA generally deprives circuit courts of jurisdiction over a petition for review brought by an alien ordered removed because of the commission of a felony. U.S. Pet. 11. The single exception occurs when a petition for review is brought solely to challenge the BIA's conclusion that the petitioner qualifies for removal as an alien who has committed an aggravated felony. *Id.* Second, the court held that, despite the sweeping changes inaugurated with the passage of IIRIRA, district courts retain habeas jurisdiction under 28 U.S.C. § 2241 to review a final removal order issued on account of an alien's commission of an aggravated felony, so long as the claims are "purely legal in nature." U.S. Pet. App. 54a. Third, the *Calcano* Court interpreted this Court's precedent

in *Felker* v. *Turpin*, 518 U.S. 651 (1996) and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) to mean that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it." *Id.* at 62a. Because it found neither an express citation to § 2241 or the words "general habeas jurisdiction" in IIRIRA, the Second Circuit reasoned that Congress had not intended to deny district courts habeas jurisdiction.

Bolstering this conclusion, the court of appeals said, was its sense of constitutional doubt about the government's contrary reading of IIRIRA. Given its understanding that IIRIRA deprived circuit courts of jurisdiction on direct review, the court worried that "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution." *Id.* at 68a.

Because St. Cyr was convicted of an aggravated felony, for which the Second Circuit found that IIRIRA bars him from raising his claims in a petition for review filed with the court of appeals, the court concluded that "no other avenue for judicial review is available" to him. U.S. Pet. 10–11. On that basis the court concluded that the district court had jurisdiction over St. Cyr's habeas petition. *See id.* at 10. A petition for certiorari followed and was granted on two questions. WLF will address only the first, namely, whether the district court had habeas corpus jurisdiction over St. Cyr's challenge to his final removal order. *Id.* at i.

SUMMARY OF ARGUMENT

The Second Circuit has ruled that the district court had jurisdiction to review St. Cyr's habeas corpus petition brought to challenge the validity of a final removal order issued against him. In arriving at this remarkable conclusion the court of appeals cited the familiar principle of constitutional doubt, claiming that a contrary interpretation of the relevant statutes would "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. For three reasons, the court of appeals erred.

First, the canon of constitutional doubt is misapplied when used to thwart the evident intent of Congress. It may be invoked only when a statute fairly admits more than one reading and when a constitutional issue may be avoided by selecting one interpretation rather than another without distorting the plain meaning of the statute.

Second, the language of IIRIRA unambiguously excludes the possibility of preserving habeas corpus jurisdiction in district courts to review the final removal orders of an alien like St. Cyr, who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C).

Third, if read according to its plain meaning, IIRIRA does not offend the Suspension Clause. That Clause was originally understood to impose a disability on Congress's power to suspend the Great Writ, not to support an inherent habeas corpus jurisdiction in federal courts. Moreover, even if original understanding is not treated as talismanic in this case, the precise context of the question presented—a restriction on the habeas corpus jurisdiction of district courts in a

narrow category of immigration cases—gives the Court additional reasons to reject the Second Circuit's invocation of constitutional doubt and, with it, the court's interpretation of IIRIRA.

ARGUMENT

The Second Circuit mistakenly held that the district court had jurisdiction to review St. Cyr's petition for habeas corpus. *See* U.S. Pet. App. 6a. In arriving at this conclusion the court of appeals was guided, it said, by the familiar principle of constitutional doubt. Citing the Suspension Clause of Article I, § 9, the Second Circuit claimed that it was avoiding the "serious constitutional question" that it feared would arise from "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes." U.S. Pet. App. 68a. Because the court of appeals misapplied the canon of constitutional doubt, its interpretation of IIRIRA should be rejected.

I. THE CANON OF CONSTITUTIONAL DOUBT IS MISAPPLIED WHEN USED TO THWART THE EVIDENT INTENT OF CONGRESS

The court of appeals misapplied the canon of constitutional doubt. That principle directs a court to follow a rule of hermeneutic prudence: "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). However, even this venerable principle of statutory interpretation has clearly drawn limits. "'Although this Court will often strain to

construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986) (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964)). Put succinctly, this Court has said that it will not allow this principle to transform an Act of Congress into "a blank sheet of paper." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

The Court's reasoning in *Miller* v. *French*, 530 U.S. 327 (2000) is instructive. At issue there was the constitutionality of the automatic stay provision of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1366-77 (1996) (PLRA). The automatic stay provides that if a district court does not rule within 30 days on a motion to terminate prospective relief affecting prison conditions, the motion will operate as a stay of the decree beginning 30 days after the motion is filed. 18 U.S.C. § 3626(e)(2). The 1997 amendments added a provision permitting a court to postpone the beginning date of this stay for no more than 60 days beyond the initial 30 days for good cause. *Id.* at § 3626(e)(3). The stay ends as soon as the court rules on the motion to terminate. *Id.* at § 3626(e)(2).

On certiorari the Court addressed whether the provision "permits federal courts, in the exercise of their traditional equitable authority, to enjoin operation of the PLRA's automatic stay provision," *Miller*, 530 U.S. at 335, and, if not, whether the automatic stay provision, interpreted this way, violates the separation of powers. The United States contended that the automatic stay provision "should be construed to leave intact the federal courts' traditional equitable discretion

to 'stay the stay.'" *Id.* In part the government relied on the canon of constitutional doubt, asserting that reading the automatic stay provision to eliminate the courts' equitable power would "raise serious separation of powers questions," *id.*, which the government urged the Court to avoid by adopting its saving construction.

The Court rejected the government's proposed saving construction entirely. Interpreting the statute to leave federal courts discretion to "stay the stay" would, the Court said, "subvert the plain meaning of the statute, making its mandatory language merely permissive." *Id.* at 336. "To allow courts to exercise their equitable discretion to prevent the stay from 'operating' during this statutorily prescribed period would be to contradict [a statute's] plain terms. It would mean that the motion to terminate merely *may* operate as a stay, despite the statute's command that it 'shall' have such effect." *Id.*

In rejecting the government's saving construction, the Court emphasized that the canon of constitutional doubt does not justify a court in thwarting the evident intent of Congress. "[W]hile this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress.'" *Id.* at 338 (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Because the Court determined that the government's proposed saving construction would gut the statute, the Court concluded that it could not fairly avoid the separation of powers issue. *Id.* (Which, incidentally, was revealed as a paper tiger. *Id.* at 341–42.)

Two lessons stand out. First, this Court will apply the canon of constitutional doubt only when the saving construction does no violence to the statutory language. Second, a constitutional issue that initially appears to warn of statutory invalidity may turn out to be a false alarm.

II. CONGRESS PLAINLY INTENDED TO REMOVE HABEAS JURISDICTION FROM DISTRICT COURTS IN CASES WHERE A REMOVAL ORDER HAS BEEN ISSUED AGAINST AN ALIEN WHO HAS COMMITTED AN AGGRAVATED FELONY

IIRIRA reflects Congress's deliberate efforts to hasten the removal of criminal aliens from this country. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Thus it is no surprise that the language of the statute cannot fairly bear the construction adopted by the Second Circuit. To read IIRIRA, as the court of appeals did, to mean that district courts retain habeas corpus jurisdiction over claims brought by aliens ordered removed because of an aggravated felony is to "judicially rewrit[e] it." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

On this point of jurisdiction Congress legislated with ample clarity. With the passage of IIRIRA it expressly repealed 8 U.S.C. § 1105(a), which had formerly authorized habeas corpus for prisoners detained pending removal. IIRIRA § 306(b), 110 Stat. 3009-612. Under the rubric of "Matters not subject to judicial review," Congress included the following provision: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of several named

criminal offenses including aggravated felonies. 8 U.S.C. § 1252(a)(2)(C). The phrases "notwithstanding *any* other provision of law" and "*no* court" are sweeping and unqualified. Yet, just to avoid misunderstanding, Congress added what this Court has characterized as an "unmistakable zipper clause," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999):

> Judicial review of *all* questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove and alien from the United States under this subchapter shall be available *only* in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added).

Despite the clarity and breadth of these words, the Second Circuit held that these provisions of IIRIRA did not strip the district court of jurisdiction over St. Cyr's habeas corpus petition. U.S. Pet. App. 5a–6a. The language of IIRIRA cannot bear the interpretation given it by the court of appeals. Even assuming that § 1252(b)(9) can be fairly read to preserve some form of judicial review for felonious aliens—and that is doubtful—§ 1252(a)(2)(C) removes all doubt. The words "[n]otwithstanding *any other* provision of law" sweep too widely to omit 28 U.S.C. § 2241. 8 U.S.C. § 1252(a)(2)(C) (emphasis added). "*[N]o* court" assuredly includes district courts. *Id.* (emphasis added). And once having defined the subject to encompass every court and reject the qualification of every law, the predicate goes on to deny in categorical

and mandatory language "jurisdiction to review *any* final order of removal against an alien who is removable by reason of having committed" an aggravated felony. *Id.* (emphasis added). When combined with Congress's express repeal of the section formerly providing for habeas corpus review for aliens held pending removal, IIRIRA § 306(b), 110 Stat. 3009-612, and its express provision for habeas corpus jurisdiction in limited circumstances, 8 U.S.C. § 1252(e)(2), Congress's intent becomes indisputable. Congress meant to ensure the prompt removal of the most dangerous class of aliens, those who have committed an aggravated felony, by denying them the opportunity to delay their departure through collateral review. Not incidentally, it meant to prevent the courts from unduly interfering with the exercise of executive discretion. *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 486 (1999).

Given this reading of IIRIRA, a simple chain of reasoning appears to dictate the result. IIRIRA denies discretionary relief to all aliens ordered removed because of the commission of an aggravated felony and deprives all courts of judicial review in such cases. St. Cyr committed an aggravated felony. Therefore, no federal district court has jurisdiction to hear St. Cyr's petition for habeas corpus. In fact, that is exactly the conclusion drawn by the Seventh Circuit. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) ("IIRIRA abolishes even review under § 2241, leaving only the constitutional writ, unaided by statute."). However, the Second Circuit noticed what it considered a wrinkle in this otherwise tidy bit of reasoning. It questioned whether "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal

permanent residents ordered removed from the country because of prior crimes" might not "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. Indeed, the court clothed its skepticism in substance by invoking the canon of constitutional doubt as a reason to adopt its strained interpretation of IIRIRA. *See id.* at 66a–67a. It need not have been so concerned. As in *Miller* v. *French*, 530 U.S. 327, 341–42 (2000), the warning of an impending collision between and statute and Constitution turns out to be a false alarm.

III. THE SUSPENSION CLAUSE IS NOT INFRINGED BY CONGRESS'S ELIMINATION OF DISTRICT COURTS' HABEAS CORPUS JURISDICTION IN CASES INVOLVING THE REMOVAL OF FELONIOUS ALIENS

The Second Circuit's constitutional doubt deserves to be explored with some precision. It said that "[a]n interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes" might "raise a serious constitutional question under the Suspension Clause of the Constitution." U.S. Pet. App. 68a. In other words, the court construed IIRIRA as not repealing habeas corpus jurisdiction for aliens who have committed aggravated felonies because, it said, the contrary reading of IIRIRA would be tantamount to conceding that IIRIRA suspends the writ of habeas corpus for such aliens. And *that*, the Second Circuit implied, might well violate the Suspension Clause.

Thus stated, the Second Circuit's constitutional doubt falls into a peculiar context, composed of three overlapping areas of constitutional law. First, there

is the Suspension Clause itself. Second, there is Congress's power to control immigration and naturalization. And third, there is Congress's power to control the jurisdiction of "inferior courts." U.S. Const. art. III, § 1. Whatever one might fairly say about an attempt by Congress to restrict habeas corpus jurisdiction in another context, the Court's decisions in the context of this case compel the conclusion that the Suspension Clause poses no bar on Congress's power to restrict or eliminate the habeas corpus jurisdiction of district courts in cases where an alien found guilty of an aggravated felony challenges a final removal order issued against him.

A. Suspension Clause

The Suspension Clause provides, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9. "[W]hen we say the writ of habeas corpus, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *see also* Joseph Story, Commentaries on the Constitution of the United States 482 (Carolina Academic Press 1987) (abridged ed., 1833) (describing the writ as "justly esteemed the great bulwark of personal liberty"). The Court has said that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973). "The underlying premise of the Great Writ is that only legal authority can justify detention." Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The

Federal Courts and the Federal System 1337 (4th ed. 1996); *see also* 3 William Blackstone, Commentaries *131 (describing habeas corpus as "the great and efficacious writ in all manner of illegal confinement").

However, the Suspension Clause was not originally understood to confer, by itself, the "privilege of the writ of habeas corpus." U.S. Const. art. I, § 9. "For the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807). Indeed, Chief Justice Marshall, writing for the Court in *Ex parte Bollman*, understood the Suspension Clause not to imply an inherent habeas corpus jurisdiction in federal courts, but rather to suggest that Congress had an inherent duty to legislatively provide for such jurisdiction. Chief Justice Marshall's description of the First Congress, an especially accurate measure of the "contemporaneous exposition of the constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821), makes this point clear:

> Acting under the immediate influence of this injunction, [the members of the First Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for it the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

Ex parte Bollman, 8 U.S. at 95.

Despite this original understanding, the Second Circuit construed IIRIRA as preserving district courts' habeas corpus jurisdiction under 28 U.S.C. § 2241. U.S. Pet. App. 66a–67a. According to that court, a contrary reading would "raise a serious constitutional question under the Suspension Clause." *Id.* at 68a. This view of the Suspension Clause not only substantially departs from its meaning as originally understood, but it also threatens to resurrect a since discredited notion that restrictions on the scope of the statutory habeas writ almost invariably pose constitutional difficulties. *See, e.g., Sanders* v. *United States*, 373 U.S. 1, 11–12 (1963) (warning that alterations in modern habeas practice that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions" under the Suspension Clause); *Johnson* v. *Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (arguing that habeas corpus is "written into the Constitution" and that its availability "cannot . . . be constitutionally abridged by Executive or by Congress"); *see also United States* v. *MacCollom*, 426 U.S. 317, 322–23 (1976) (mentioning but avoiding a suspension clause claim).

Such an expansive interpretation of the writ conflicts with more recent decisions, which have increasingly recognized that the statutory writ and the Great Writ are not one and the same and that restrictions on the statutory writ are not unavoidably vulnerable to attack under the Suspension and Due Process Clauses. *Kuhlmann* v. *Wilson*, 477 U.S. 436, 445 n.7 (1986) (noting that the modern postconviction writ and the writ with which the suspension clause is concerned may not be the same); *Swain* v. *Pressley*,

430 U.S. 372, 384 (1977) (Burger, C.J., concurring) (contending that the suspension clause constitutionalizes the writ only as it existed when the Constitution was adopted); *Bounds* v. *Smith*, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting) (same); *id.* at 840 (Rehnquist, J., dissenting). More to the point, this Court has specifically distinguished between 28 U.S.C. § 2241 and the Great Writ, holding that the former offers greater leeway for collateral review than the latter. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

Such a question of constitutional interpretation ought to be resolved in favor of original understanding. *See McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring). This is particularly true when, as where, an originalist inquiry appears to affirmatively exclude the competing interpretation. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, (1989). If the Court selects this course, the analysis is complete. As originally understood, the Suspension Clause vests no inherent habeas corpus jurisdiction in federal courts. It follows that the Second Circuit was mistaken to rely on the canon of constitutional doubt as a reason to adopt its strained reading of IIRIRA.

But even if the Court wishes to assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789," *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), the Second Circuit's view of the Suspension Clause must be rejected. *Felker* itself demonstrates that not every restriction on the statutory writ amounts to a suspension of the constitutional writ. *Id.* at 664. Furthermore, the question presented is not exhausted by the

Suspension Clause alone. Because a correct interpretation of the Constitution generally "depend on a fair construction of the whole instrument," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), a discussion of constitutional issues beyond the Suspension Clause is necessary. These issues include Congress's powers to control immigration and to regulate the jurisdiction of inferior courts. Only with such a holistic perspective is it possible to accurately assess the constitutional doubt expressed by the Second Circuit. So to the congressional power over immigration we now turn.

B. Immigration

Article I delegates to Congress the authority "[t]o establish a uniform rule of naturalization." U.S. Const. art. I, § 8. This power over naturalization is commonly described as "plenary," *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952), and encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. See *Reno* v. *Flores*, 507 U.S. 292, 305–06 (1993). When "aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson*, 342 U.S. at 534.

The scope of judicial review over a final removal order is correspondingly narrow. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) ("Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); *Fong Yue Ting* v. *United*

States, 149 U.S. 698, 731 (1893) ("[T]he judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject").

Besides the breadth of congressional power, judicial deference is proper because laws governing immigration primarily call for the exercise of political judgment and therefore fall close to the line separating justiciable from political questions. The Court has repeatedly acknowledged that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–89 (1952); *see Carlson* v. *Landon*, 342 U.S. 524, 537–38 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, . . . may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks omitted).

Moreover, this Court has repeatedly held that deportation (or its contemporary equivalent, removal) is not punishment. *Reno* v. *American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999); *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893). Although aliens who lawfully enter the United States are entitled to due process of law before being removed, *Landon*

v. *Plasencia*, 459 U.S. 21, 32–33 (1982),[2] proof of legal error, standing alone, does not rise to the level of a due process violation. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927). And legal error, not mistaken identity or official abuse, is all that St. Cyr claims. *See* U.S. Pet. App. 4a. He has therefore received all the process due under the Constitution.

Far from justifying a cramped view of congressional power, as the Second Circuit seemed to think, this case particularly calls for judicial deference. Indeed, the plenary nature of Congress's power over immigration and its basis in separation of powers principles means that constitutional doubt, if it exists at all, runs *in favor* of the government's interpretation of IIRIRA. For a decision by this Court permitting St. Cyr to pursue a collateral attack on his final removal order, despite the plain language of IIRIRA intending to preclude such an attack, may well embroil the judiciary in questions for which it has neither institutional competence nor a constitutional mandate. In short, that the question presented arises in the context of immigration means that the plain meaning of IIRIRA

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[2] Due process concerns should not affect the analysis of the question presented, because aliens subject to removal routinely receive the essentials of due process, notice and an opportunity to be heard, just as St. Cyr did in this case. *See* U.S. Pet. App. 3a–4a. In addition, at a hearing before the immigration judge the INS bears the burden of proving by "clear, unequivocal, and convincing" evidence that the alien is removable. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). Persons alleging U.S. citizenship enjoy even greater protection: colorable claims of citizenship must be initially resolved by a court instead of an executive agency. *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). More than this the Constitution does not require.

should be given particular respect, not distorted to avoid a non-existent question under the Suspension Clause. *See United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 528 (1950).

C. Article III

St. Cyr's quest to obtain collateral review fares no better under Article III. Congress holds the power "[t]o constitute tribunals inferior to the Supreme Court," U.S. Const. art. I, § 8, but its exercise is discretionary. *See id.* at art. III, § 1. This "Madisonian Compromise," Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The Federal Courts and the Federal System 8 (4th ed. 1996), leaves Congress largely free to structure the jurisdiction of lower federal courts. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57–60, 67 (1982) (opinion of Brennan, J.); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). The Nation survived for more than a century before inferior federal courts had federal-question jurisdiction. Indeed, until 1976 federal-question jurisdiction was restricted by an amount-in-controversy requirement that left many potential federal claims entirely without a federal forum. None of these limitations offended Article III.

Neither does IIRIRA, which eliminates the habeas corpus jurisdiction of district courts when asked to review the final removal order of an alien who has committed an aggravated felony. *See Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Unless Article III compels Congress to vest in inferior federal courts as much judicial power as Article III allows them to possess—a wholly insupportable interpretation of

Article III, given the Madisonian Compromise—it poses no obstacle to IIRIRA's provisions stripping district courts of habeas corpus jurisdiction over felonious foreigners.

* * *

Thus if pressed to say whether the United States Congress may bar aliens guilty of aggravated felonies from receiving discretionary relief *and* strip district courts of jurisdiction to hear their claims, the Court's decisions interpreting the Suspension Clause and Congress's power over immigration and lower court jurisdiction mean that one ought to answer "yes." Deciding how much judicial review to give criminal aliens falls well within the scope of authority granted by the Constitution to the political branches. Congress enacted IIRIRA for the legitimate purpose of "abbreviat[ing] the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963). In this sense IIRIRA reflects the reality that "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 321–325 (1992). Certainly, St. Cyr's four-year-long quest to obtain discretionary relief eliminated by an Act of Congress vividly illustrates the problem Congress has attempted to address.

What St. Cyr so plainly wants is another bite at the apple, which is exactly what Congress has tried to prevent in cases like his. "Congress wanted to expedite the removal of criminal aliens from the United

States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." *Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). Far from representing a momentary fit of xenophobia, IIRIRA reflects Congress's measured judgment that the Nation is safer when the most dangerous category of foreigners, those who commit aggravated felonies, are promptly removed from our shores. Contrary to the Second Circuit's reasoning, nothing in the Constitution prevents the country's elected representatives from making that choice.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court for the Second Circuit should be reversed.

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Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICI CURIAE* OF THE FLORIDA IMMIGRANT ADVOCACY CENTER, CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NATIONAL COUNCIL OF LA RAZA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, THE AMERICAN JEWISH COMMITTEE, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, IMMIGRANT AND REFUGEE SERVICES OF AMERICA, UNITE, HEBREW IMMIGRANT AID SOCIETY, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS, COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, COALITION FOR THE HUMAN RIGHTS OF IMMIGRANTS, WASHINGTON ALLIANCE FOR IMMIGRANT AND REFUGEE JUSTICE, AND THE MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER IN SUPPORT OF THE JUDGMENT BELOW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION 5

STATEMENT OF FACTS 6

SUMMARY OF THE ARGUMENT 20

ARGUMENT 21

I. THE RETROACTIVE ELIMINATION OF INA § 212(c) WOULD BE A RADICAL CHANGE IN IMMIGRATION LAW AFFECTING A WIDE RANGE OF DESERVING LAWFUL PERMANENT RESIDENTS, INCLUDING VETERANS, SPOUSES AND PARENTS OF U.S. CITIZENS, BUSINESS OWNERS, AND COMMUNITY LEADERS 21

A. The Retroactive Elimination of 212(c) Would Require the Deportation of Valuable Members of Society 21

B. Elimination of 212(c) Relief for Permanent Residents with Pre-AEDPA Convictions Would Convert the Mere Possibility of Deportation Into Mandatory Deportation, Even for Individuals with Minor Crimes ... 22

C. The Retroactive Elimination of 212(c) Relief Will Result in Extreme Hardship to Spouses, Children, and Parents Who are U.S. Citizens 25

II. MANY PERMANENT RESIDENTS WITH PRE-AEDPA CONVICTIONS WOULD TODAY BE UNQUESTIONABLY ELIGIBLE FOR 212(c) RELIEF IF THE INS HAD STARTED PROCEEDINGS BEFORE AEDPA 27

TABLE OF CONTENTS – Continued

Page

CONCLUSION 29

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Page

CASES

Arias-Agramonte v. INS, No. Civ 2412 (RWS), 2000 U.S. Dist. LEXIS 10724 (S.D.N.Y. July 31, 2000) 15

Garcia v. INS, 239 F.3d 409 (1st Cir. 2001) 24

Matter of Marin, 16 I&N Dec. 581 (BIA 1978) 5

U.S. v. Pacheco, 225 F.3d 148 (2d Cir. 2000) 24

U.S. v. Holguin-Enriquez, 120 F.Supp. 2d 969 (D.Kan. 2000) 24

Velasquez v. Reno, 37 F.Supp. 2d 663 (D.C.N.J. 1991) 16

DOCKETED CASES

Ashcroft v. Ma, No. 00-38 (oral argument held Feb. 21, 2001) 23

FEDERAL STATUTES AND REGULATIONS

8 U.S.C. §§ 1101 *et seq.* (2001) 1

8 U.S.C. § 1101(a)(43)(F) (2001) 24

8 U.S.C. § 1101(a)(43)(G) (2001) 23

8 U.S.C. § 1101(a)(48)(B) (2001) 23

8 U.S.C. § 1182(c) (2001) 1

8 U.S.C. § 1229b(a)(3) (2001) 23

8 U.S.C. § 1231(b)(3) (2001) 25

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) 1

TABLE OF AUTHORITIES – Continued

Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) 1

Immigration and Nationality Act

INA § 101(a)(43)(F) 24

INA § 101(a)(43)(G) 23

INA § 101(a)(48)(B) 23

INA § 212(c) ..... *passim*

INA § 240A(a)(3) 23

INA § 241(b)(3) 25

8 C.F.R. § 208.17 ..... 8, 25

8 C.F.R. § 208.17(d)(4) 8

8 C.F.R. § 208.23(b) 25

TREATIES

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985) 8

MISCELLANEOUS

Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail, by Susan Gilmore, The Seattle Times, Feb. 7, 2000 ..... 9, 11

TABLE OF AUTHORITIES – Continued

Page

Woman Awaits Deportation Appeal with Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped up by Immigration Law, by Tamyra Howser, The News Tribune, Jan. 1, 2001 .....9, 10

Judge Orders Deportation of Puyallup Mother of Four, by Susan Gilmore, The Seattle Times, Feb. 10, 2000 9

Caught in the Wheels of Justice, by Nicole Brodeur, The Seattle Times, Mar. 14, 2000..... 10

Puyallup Woman Comes Home: Emma de Hay Still Faces Fight with INS to Remain in U.S., by Tamyra Howser, The News Tribune, April 1, 2000..... 10

Many Legal Immigrants Finding That Their Pasts can Catch up to Them With New Laws, by Sudarsan Raghavan, The Philadelphia Inquirer, July 24, 1997 11

The Osgood File: Man Born in Colombia but Raised in the U.S. May be Deported Because of Single Arrest Several Years Ago (CBS News Broadcast, July 8, 1997)..... 12

Why is the Government Taking my Father Away? by Jaime Jaramillo, Knight Ridder/Tribune News Service, June 23, 2000 12

Vietnam Vet Gets Break in Deportation Case, by Mark Hamblett, New York Law Journal, Sept. 18, 2000 12

INS Shifting Policy on Immigrant Detention, by Philip P. Pan, The Washington Post, Aug. 9, 1999 14

TABLE OF AUTHORITIES – Continued

Page

Catholic Legal Immigration Network, Inc., The Needless Detention of Immigrants in the United States, Report 4, Aug. 2000 22

Symposium, *United States Immigration Policy at the Millennum: Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,* 113 Harv. L. Rev. 1950 (2000)..... 25

INTEREST OF THE AMICI CURIAE[1]

Amici curiae are a broad range of legal assistance, community based, and national policy organizations concerned about the harsh impact of the 1996 amendments to the Immigration and Nationality Act[2] (INA) on longtime legal permanent residents and their families. Through their experiences as attorneys, family members, and friends of immigrants, *amici curiae* have gained extensive firsthand knowledge of the ways in which the elimination of discretionary relief from deportation for lawful permanent residents with pre-1996 convictions would affect our nation's families and communities. *Amici curiae* strongly believe that an understanding of these effects is essential to this Court's analysis of whether section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996[3] (AEDPA) and section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] (IIRIRA) eliminate INA § 212(c), 8 U.S.C. § 1182(c) (1994) relief for longtime permanent residents with convictions that pre-date AEDPA.

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[1] This brief *amici curiae* is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

[2] Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* (2001).

[3] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal aid organization dedicated to promoting the basic human rights of immigrants. FIAC's attorneys have represented hundreds of lawful permanent residents affected by the 1996 amendments to the INA. In our experience, many permanent residents with pre-AEDPA convictions have extremely compelling cases and, if given the opportunity to file for 212(c) relief, would likely prevail in immigration court. FIAC submits this *amici curiae* brief to make the Court aware of the devastating impact the retroactive elimination of 212(c) relief would have on our nation's longtime immigrants, their American families, and our communities.

Citizens and Immigrants for Equal Justice (CIEJ) is a nationwide coalition of U.S. citizens and lawful permanent residents whose family members face deportation under the new immigration laws. As family members, CIEJ's members would be directly affected by the retroactive application of the 1996 amendments eliminating 212(c) relief. They are children who would lose their parents. They are men and women who would lose their husbands and wives and be left to raise children alone, without the support of their families' primary wage earners. And they are elderly parents who would be permanently deprived of the emotional and financial support of their sons and daughters. The retroactive elimination of 212(c) relief would make these hardships inevitable.

The American Immigration Lawyers Association (AILA) is a voluntary association of 7,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission is to promote justice and advocate for fair and reasonable

immigration laws and policies. AILA members represent thousands of immigrants who have experienced a severe negative impact because of the retroactive elimination of discretionary relief from deportation.

The National Council of La Raza (NCLR) is a non-profit organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. The NCLR cooperates with other organizations on policy development, public education, and advocacy on immigration issues as well as other issues that affect Hispanic Americans. The NCLR it is deeply concerned that the retroactive elimination of 212(c) relief would threaten the well-being of many Hispanic American families.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights legal organization founded in 1968 to promote and protect the rights of Latinos in the United States through litigation, advocacy, and education. MALDEF has a long history of advancing the civil rights of immigrants. MALDEF is gravely concerned about the harsh effects of the 1996 amendments on immigrants and their families. The retroactive imposition of bars to 212(c) relief for pre-AEDPA criminal conduct is an issue of vital concern to MALDEF and the many immigrants it represents.

The Asian American Legal Defense and Education Fund (AALDEF) is a nonprofit civil rights organization that litigates issues affecting immigration, voting, and labor rights of Asian Americans. On a daily basis, lawful permanent residents, their families, their social workers,

and their attorneys contact AALDEF about hardships resulting from the 1996 amendments. The repeal of section 212(c) and its retroactive application to lawful permanent residents with pre-AEDPA convictions has left a wake of human tragedy affecting not only those individuals subject to deportation, but also their spouses, parents, and children.

Lutheran Immigration and Refugee Service (LIRS), founded in 1939, provides services and advocacy on behalf of refugees, asylum seekers and immigrants. LIRS provides direct services through its national resettlement affiliate network, gives grants to independent grassroots organizations providing legal services to immigrants, and coordinates Detention Watch Network, a coalition of organizations advocating for the reform of U.S. immigration detention policies. Through these activities, LIRS is concerned by the wrenching hardships facing lawful permanent residents and their families that would be brought about by the retroactive application of the 1996 amendments barring 212(c) relief.

The American Jewish Committee (AJC) is a national organization of approximately 100,000 members and supporters. AJC was founded in 1906 to protect the civil and religious rights of Jews and to promote human rights for all. Since its founding, AJC has been at the forefront of the movement to promote a generous and humane U.S. immigration policy. AJC is firmly opposed to the stripping away of due process and other civil rights of legal immigrants, which we believe is at odds with core American principles of justice and fairness. For this reason, AJC

is troubled by the prospect of 212(c) relief being eliminated for longtime permanent residents with pre-AEDPA criminal convictions.

The Leadership Conference on Civil Rights (LCCR) is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. The LCCR works in cooperation with other national, regional, and local organizations on policy analysis, public education, and advocacy activities relating to immigration and other important social issues affecting civil rights. The LCCR is deeply concerned that the retroactive elimination of 212(c) relief for lawful permanent residents threatens both American families and fundamental principles of civil rights.

The statements of interest from the remaining amici curiae are contained in Appendix A to this brief.

INTRODUCTION

The case of Enrico St. Cyr presents the question of whether Congress's 1996 amendments to INA § 212(c) eliminate the possibility of discretionary relief from deportation for longtime lawful permanent residents who face removal based on pre-AEDPA conduct. If the INS had initiated proceedings against these individuals before AEDPA, they would today be eligible to apply for relief under INA § 212(c) and thereby have the opportunity to present their equities to an immigration judge. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (equities include evidence of rehabilitation, nature of conviction, hardship, ties to the United States, and military and community

service). Yet the INS insists that the 1996 amendments strip these individuals of this right, even though the conduct that makes them deportable occurred prior to these amendments. This brief *amici curiae* uses case examples to illustrate how lawful permanent residents and their families will be affected by the outcome of Mr. St. Cyr's case and argues that the elimination of 212(c) relief for lawful permanent residents with pre-AEDPA convictions would be nothing short of a radical change in immigration law that would result in the mandatory deportation of many deserving lawful permanent residents.

STATEMENT OF FACTS

The following cases are some of the many examples of lawful permanent residents who, like Mr. St. Cyr, face imminent deportation if the INS is allowed to retroactively eliminate 212(c) relief. The INS considers all of these people aggravated felons. Thus, if the 1996 amendments eliminating INA § 212(c) are applied to their cases, they would be ineligible for any discretionary relief from deportation. Yet, in all of these cases, the individuals face deportation for conduct that predates the 1996 amendments. In many of the cases, the INS made no effort to deport the individuals at the time they became deportable. Had it done so, these lawful permanent residents would have been eligible to apply for the very 212(c) relief that the government now insists is unavailable to them.

Ihsan Elias Dawlett is a 58-year-old Iraqi who came to the United States in 1973 with his wife and family in order to obtain medical attention for his son, Firas, who has Down's Syndrome.[5] In 1979, the entire family became lawful permanent residents; his wife and three children later became U.S. citizens.[6] Mr. Dawlett built his own construction business and became a well-respected member of his church and community.[7] In 1996, Mr. Dawlett's wife of 27 years died, leaving him as the primary caretaker of their son Firas.[8] Although Firas is now 26, he still lives with his father and depends on him for emotional support and everyday needs.[9] Mr. Dawlett maintains an exceptionally close relationship with Firas and takes him to a school for people with special needs.[10]

In 1994, Mr. Dawlett was convicted of theft after he wrote a bad check for approximately $1,500 worth of construction supplies.[11] He pled guilty to the offense and received a five-year suspended jail sentence and probation.[12] In 1998, four years after his conviction, the INS

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[5] L-1 (Copy of Photograph of Firas Dawlett); L-2-3 (Letter of Counsel Peter Williamson).

[6] L-3.

[7] L-5 (Letter of Ali Hasoon); L-6 (Letter of Sam Delly); L-7 (Letter of Dr. Moayyad Ezzat).

[8] L-3-4 (Letter of Counsel Peter Williamson).

[9] L-8 (Letter of Director of Hope Village); L-3 (Letter of Counsel Peter Williamson); L-5 (Letter of Ali Hasoon); L-6 (Letter of Sam Delly); L-7 (Letter of Dr. Moayyad Ezzat).

[10] L-8 (Letter of Director of Hope Village).

[11] L-3-4 (Letter of Counsel Peter Williamson).

[12] L-3.

detained Mr. Dawlett and placed him in removal proceedings as an aggravated felon. Mr. Dawlett's detention had a devastating effect on his son Firas, who became withdrawn and cried constantly for his father.[13]

An immigration judge found that Mr. Dawlett was ineligible for 212(c) relief because the INS had not placed him in proceedings until after AEDPA. Had Mr. Dawlett been given the opportunity to file for 212(c) relief, he would likely have prevailed because of the strong equities in his case. Absent a finding from this Court that 212(c) relief remains available to people in Mr. Dawlett's circumstances, he will be ordered deported.[14]

Emma Mendez de Hay is a 40-year-old woman who came to the United States from Mexico more than 20 years ago and became a lawful permanent resident shortly thereafter. She is a divorced mother of four U.S. citizen children for whom she has been the primary care giver. Ms. Mendez de Hay's mother and all but one of her

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[13] L-8 (Letter of Director of Hope Village); L-9-11 (Letter of Dawlett and Bashar Dawlett).

[14] An immigration judge recently granted Mr. Dawlett deferral of removal under the Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985). However, a grant of deferral under the Convention Against Torture does not give Mr. Dawlett any lawful status or permanent permission to remain in the United States. *See* 8 C.F.R. § 208.17. If conditions change in Iraq, he will be deported unless he is given an opportunity to file for 212(c) relief. *See* 8 C.F.R. § 208.17(d)(4). *See infra* pages 24-25 and note 59.

siblings reside in the United States and are U.S. citizens or lawful permanent residents.[15]

In 1992, during a cousin's visit to her home, Ms. Mendez de Hay acted as a telephone interpreter for what turned out to be a drug transaction.[16] Ms. Mendez de Hay pled guilty to using a communication facility to facilitate the distribution of cocaine and cooperated with the government in its prosecution of the drug traffickers.[17] She was sentenced to three years' probation with no jail time. The government promised that it would recommend to the INS that she not be deported.[18]

Ms. Mendez de Hay completed her probation and resumed her life in Washington state. She built a successful restaurant business, paid taxes, continued to support her four children, and volunteered as an interpreter for a local hospital and clinic. With the goal of perfecting her English and becoming a professional interpreter, she obtained her GED and took college classes.[19] The INS

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[15] *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail,* by Susan Gilmore, The Seattle Times, February 7, 2000; *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law,* by Tamyra Howser, The News Tribune, Jan. 1, 2001.

[16] *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law,* by Tamyra Howser, The News Tribune, Jan.1, 2001.

[17] L-12 (Letter from Counsel Erik Bauer).

[18] *Id.*

[19] *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail,* by Susan Gilmore, The Seattle Times, Feb. 7, 2000;

made no effort to deport her for her conviction.[20] Had it done so, she would have been eligible to apply for relief from deportation under INA § 212(c). Moreover, she would have been a strong candidate for relief in light of her compelling equities, including her lack of any other criminal history.

In 1999, Ms. Mendez de Hay traveled to Italy to meet her fiancé's family. Upon her return, the INS detained her and placed her in removal proceedings. For seven months, she was detained at a facility in Louisiana, hundreds of miles from her children. During her detention, Ms. Mendez de Hay's 20-year-old daughter, an honor student at Pierce College, was forced to drop out of classes and work two jobs in order to support and care for her two younger brothers.[21] Ms. Mendez de Hay's 14-year-old son had problems at school, and her 11-year-old son, a child with special needs, became depressed and talked of wanting to die.[22]

Judge Orders Deportation of Puyallup Mother of Four, by Susan Gilmore, *The Seattle Times*, Feb. 10, 2000; *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law*, by Tamyra Howser, The News Tribune, Jan. 1, 2001.

[20] In 1995, Ms. Mendez de Hay presented herself for INS inspection upon her return from a trip abroad.

[21] L-13 (Letter of Vanessa Hay); L-14 (Letter of Professor Alan Kemp); *Caught in the Wheels of Justice*, by Nicole Brodeur, The Seattle Times, Mar. 14, 2000; *Puyallup Woman Comes Home: Emma de Hay Still Faces Fight With INS to Remain in U.S.*, by Tamyra Howser, The News Tribune, April 1, 2000.

[22] L-15 (Statement of Esmeralda Mendez); L-5-6 (Report from Sea Mar Community Health Center); *Caught in the Wheels of Justice*, by Nicole Brodeur, The Seattle Times, Mar. 14, 2000;

Ms. Mendez de Hay's case is currently pending at the Board of Immigration Appeals (BIA). Absent the opportunity to file for 212(c) relief, she will be ordered deported.

Carlos "Charlie" Jaramillo was born in Colombia and immigrated to the United States in 1965 at the age of eight months. His first language is English and he does not read or write Spanish. Mr. Jaramillo's wife, Laura, and two adolescent children, Jamie and Priscilla, are U.S. citizens. A construction contractor who ran his own business for many years, Mr. Jaramillo is considered a model citizen in his hometown of West Goshen, Pennsylvania.[23]

Over ten years ago, in 1989, Mr. Jaramillo pled guilty to possession with intent to deliver 1/3 of a gram of cocaine.[24] He received no jail time for this offense, but was instead sentenced to five years' probation and 200 hours of community service.[25] Mr. Jaramillo completed his probation and assumed that he could put the past behind him.[26] For seven years, the INS made no effort to deport him for his conviction. If the INS had placed Mr. Jaramillo in proceedings before AEDPA was enacted in 1996, he would have been eligible to apply for 212(c)

Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail, by Susan Gilmore, The Seattle Times, Feb. 7, 2000.

[23] *Many Legal Immigrants Finding That Their Pasts can Catch up to Them With New Laws*, by Sudarsan Raghavan, The Philadelphia Inquirer, July 24, 1997.

[24] *Id.*

[25] *Id.*

[26] *Id.*

relief. Given his longstanding ties to the United States and his lack of other criminal history, he would likely have prevailed.[27]

In 1996, Mr. Jaramillo applied for citizenship. The INS arrested him at the naturalization office, detained him, and, seven years after his conviction, placed him in deportation proceedings as an aggravated felon.[28] Mr. Jaramillo was ordered deported and has a habeas corpus petition seeking 212(c) relief that is pending in district court. Absent a holding from this Court that 212(c) relief remains available for individuals in his circumstances, his deportation order will become final. Mr. Jaramillo's family members, including his U.S. citizen wife and two U.S. citizen children, are devastated by the prospect of Mr. Jaramillo being deported.[29]

Luis Perez is a decorated former Marine and Vietnam veteran who immigrated to the United States at the age of nine.[30] As an 11th grader in high school during the Vietnam War, Mr. Perez volunteered for the Marines.[31] He served in Vietnam for two years and was on active duty

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[27] *The Osgood File: Man Born in Colombia but Raised in the U.S. May be Deported Because of Single Arrest Several Years Ago* (CBS News Broadcast, July 8, 1997) (available on Burrelle's Information Services).

[28] *Id.*

[29] *Why is the Government Taking My Father Away?* by Jaime Jaramillo, Knight Ridder/Tribune News Service, June 23, 2000.

[30] Mr. Perez's full name is Luis Jose Bolivar Nicanor Perez-Portes.

[31] *Vietnam Vet Gets Break in Deportation Case*, by Mark Hamblett, New York Law Journal, Sept. 18, 2000.

status in the United States for an additional two years thereafter.[32] He received several medals for his service, reached the rank of corporal, and was honorably discharged.[33]

Mr. Perez is married and has four U.S. citizen children, including a daughter whom he supports while she is attending Pace University.[34] Mr. Perez had a heart attack in 1988 and he suffers from Conn's Syndrome, a disease of the adrenal gland that can be life threatening if untreated.[35] His health condition requires that he take medications regularly and remain under a doctor's care.[36]

In 1995, Mr. Perez was arrested for possession with intent to distribute cocaine. He pled guilty and received a two-year prison term to be followed by three years' supervision. A model inmate, Mr. Perez served only nine months and eleven days.[37] The INS made no effort to deport Mr. Perez at the time of his conviction. If it had, he would have been eligible to apply for 212(c) relief. In light of his military career, the fact that this was his only offense in an otherwise unblemished record, and the other equities in his case, Mr. Perez would likely have been granted 212(c) relief. In 1998, the INS initiated removal proceedings against him as an aggravated felon.

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[32] L-19 (Decision of the Immigration Judge).

[33] *Id.*

[34] L-20.

[35] *Id.*

[36] *Id.*

[37] *Id.*

The immigration judge ruled that Mr. Perez was ineligible for 212(c) relief because of the 1996 amendments.[38]

Vongphachanh "Rick" Siridavong, age 25, came to the United States as a refugee from Laos approximately 20 years ago. Both of his parents and all seven of his siblings are U.S. citizens. In 1995, shortly after graduating from high school, Mr. Siridavong went out with some high school friends and stole a car radio.[39] He pled guilty and received a two-year suspended jail sentence and probation, as well as restitution in the amount of $655.96 and 50 hours of community service.[40] Mr. Siridavong served no jail time for his offense. Due to excellent performance, he was released early from probation.[41] Shortly after his arrest, Mr. Siridavong began attending college.

In February 1999, shortly after Mr. Siridavong applied for citizenship, INS agents went to his house, handcuffed him in front of his mother, and placed him in removal proceedings.[42] He was detained for five months in a county jail. Because his crime is now considered an

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[38] The immigration judge terminated proceedings against Mr. Perez to allow him to apply for naturalization. The INS appealed that ruling to the BIA, however. If the BIA sustains INS's appeal, Mr. Perez faces deportation unless he is eligible for 212(c) relief.

[39] *INS Shifting Policy on Immigrant Detention*, by Philip P. Pan, The Washington Post, Aug. 9, 1999.

[40] L-26 (Letter from Probation and Parole Officer).

[41] *Id.*

[42] *INS Shifting Policy on Immigrant Detention*, by Philip P. Pan, The Washington Post, Aug. 9, 1999.

aggravated felony, Mr. Siridavong was found ineligible for 212(c) relief and ordered removed. Given the nature of his crime and his strong ties to the United States, Mr. Siridavong would likely have won his case if he had been allowed to apply for 212(c) relief. His case is pending on appeal at the BIA. Absent a holding by this Court that 212(c) remains available for cases such as his, his order of deportation will become final.

Jerry Arias-Agramonte is a 49-year-old lawful permanent resident who immigrated to the United States as a teenager in 1967. He is the father of six children, all of whom are U.S. citizens. *See Arias-Agramonte v. INS*, No. Civ 2412 (RWS), 2000 U.S. Dist. LEXIS 10724, at *6 (S.D.N.Y. July 31, 2000) (quoting decision of the immigration judge granting 212(c) relief). In 1977, Mr. Arias was in a New York restaurant when someone asked him to change a $50.00 bill. *Id.* at 5. The police then raided the restaurant and discovered that the $50.00 bill in Mr. Arias' possession was a marked bill from a drug transaction. *Id.* He pled guilty to criminal sale of a controlled substance in the fifth degree and was sentenced to two years' probation. *Id.* at 2. Mr. Arias received no jail time for this offense and has no other criminal convictions. *Id.* at 5-6.

For almost 20 years, the INS took no steps to deport Mr. Arias for his conviction. But in 1998, the INS detained Mr. Arias as he returned from his father's funeral in the Dominican Republic and placed him in removal proceedings. *Id.* at 2. An immigration judge granted Mr. Arias 212(c) relief based on his "unusual and outstanding" equities. *Id.* at 6. The INS appealed the decision, and the BIA reversed, holding that Mr. Arias was not eligible for

212(c) relief because INS had placed him in proceedings after AEDPA. *Id.* at 12. Mr. Arias filed a petition for writ of habeas corpus, which is being held in abeyance pending the outcome of Mr. St. Cyr's case.

Jose Velasquez is 53 years old and has been a lawful permanent resident for 41 years. *See Velasquez v. Reno*, 37 F.Supp. 2d 663, 664 (D.C. N.J. 1991). As a child Mr. Velasquez accompanied his father, a Panamanian diplomat, on assignments to the United States. *Id.* Mr. Velasquez remained in the United States to finish high school at West Catholic High School in Philadelphia. *Id.* He became a lawful permanent resident in 1960. In 1965, Mr. Velasquez married a U.S. citizen. They have three children, all of whom are U.S. citizens. His mother and all of his siblings are also U.S. citizens. For many years, Mr. Velasquez ran his own deli business in Philadelphia. *Id.*

In 1980, a friend approached Mr. Velasquez at a party and asked where he could buy some cocaine. Mr. Velasquez replied that he did not sell cocaine but suggested someone who might. *Id.* at 665. Mr. Velasquez was arrested and pled guilty to conspiracy to sell, and the sale or delivery of a controlled substance. He received no jail time but was sentenced to five years' probation and a $5,000 fine. *Id.* He finished his probation successfully and has had no criminal problems since.

The INS made no effort to deport Mr. Velasquez for his conviction prior to the 1996 amendments. If it had, he would have been eligible to apply for 212(c) relief. Mr. Velasquez would have been a strong candidate for such relief given the equities in his case. In 1998, the INS

detained Mr. Velasquez as he returned from a trip to Panama to visit his mother who was scheduled for surgery. The INS placed him in removal proceedings.[43] His removal order is currently on appeal to the BIA. Unless the Court finds that 212(c) relief remains available to individuals like Mr. Velasquez, his removal order will become final.

Javier Guevara is 31 years old and disabled. He came to the United States from Mexico at the age of four and became a permanent resident in 1988. Mr. Guevara is married to a Native American woman from the Pascua Yaqui Tribe and lives with her on the tribe's reservation. They have two U.S. citizen children, ages eight and five, who are also members of the Pascua Yaqui Tribe.[44] Mr. Guevara's mother and sister are also U.S. citizens. Mr. Guevara had to have his right leg amputated below the knee because of a bone infection. His amputated limb requires regular treatment from a physician and physical therapist.[45] Mr. Guevara also suffers from diabetes, which he controls with medication and regular monitoring of his blood sugar levels. Despite his disability, Mr. Guevara works for the Pascua Yaqui Tribe doing residential and commercial construction and is the sole supporter of his family.[46] Mr. Guevara also volunteers his time and skills

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[43] Both before and after AEDPA, Mr. Velasquez traveled abroad and each time had no trouble entering back into the United States.

[44] L-28-29 (Immigration Court Brief).

[45] L-29.

[46] L-36 (Letter from Bernie Montiel).

to renovate old buildings and homes on the reservation in Tuscon and Guadalupe, Arizona.[47]

In 1992, Mr. Guevara was convicted of conspiracy to sell cocaine for giving a friend a ride to a drug deal.[48] He received a sentence of four years' probation, 200 hours community service, and a $2,000 fine, which he successfully completed.[49] He served no jail time. The INS took no steps to deport Mr. Guevara for his conviction. Had the INS put Mr. Guevara in proceedings before 1996, he would have been eligible to apply for 212(c) relief. Moreover, he would have been a strong candidate for such relief given the compelling factors in his case.

In 2000, eight years after his drug conviction, the INS initiated proceedings against Mr. Guevara as an aggravated felon. He has asked for the opportunity to file for 212(c) relief, but the INS argues that he is ineligible because it did not start proceedings against him until after AEDPA. His case is pending in immigration court.

The Tribal Counsel of the Pascua Yaqui Tribe considers Mr. Guevara a respected and valuable member of the tribal community and recently passed a resolution urging the INS not to deport him.[50]

Carlos Garcia left his home country of El Salvador in 1978 during the civil war, and he became a permanent resident in 1982. Both of Mr. Garcia's parents are U.S.

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[47] L-38 (Resolution of Pascua Yaqui Tribe).

[48] L-29 (Immigration Court Brief).

[49] L-29.

[50] L-37-40 (Resolution of the Pascua Yaqui Tribe).

citizens. Upon arriving in the United States, Mr. Garcia attended the International Language Institute in Washington, DC and learned to speak, read, and write English fluently. He also attended the Northern Virginia Community College and took courses in engineering.[51] For years, Mr. Garcia has worked for a catering company. As part of his job, he has worked at functions at the White House, including the inauguration of President Ronald Reagan and a dinner hosted by President George Bush, Sr.[52] Mr. Garcia regularly attends church, is a member of the Smithsonian Institute, and is involved with a bone marrow transplant program to help children.[53]

In 1993, Mr. Garcia pled guilty to taking $200 from the department store where he then worked.[54] He was sentenced to two years' probation with a suspended two-year jail sentence. He completed probation early and served no jail time.[55] Apart from this single incident, Mr. Garcia has no criminal history and would have been a strong candidate for 212(c) relief.[56] The INS, however, took no steps to deport him for this conviction before 1996.

In 1998, the INS placed Mr. Garcia in removal proceedings after he returned from a brief trip abroad. Because his crime is now considered an aggravated

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[51] L-41 (Letter of Carlos Garcia).

[52] L-41-42.

[53] L-42-43.

[54] L-45 (Immigration Court Motion).

[55] *Id.*

[56] L-46.

felony, the INS argues that he is ineligible for 212(c) relief. Absent the opportunity to file for such relief, he faces mandatory deportation.

SUMMARY OF THE ARGUMENT

Lawful permanent residents with pre-AEDPA convictions are valuable members of society with compelling equities against deportation. If given the opportunity to apply for 212(c) relief, many of them would likely prevail. They have served honorably in our nation's wars. They marry U.S. citizens, raise U.S. citizen children, and care for U.S. citizen parents. They run businesses and volunteer in our communities. In many cases, their last contact with the criminal justice system was years, even decades, ago. Their convictions often involved minor offenses, even misdemeanors, for which they served little or no jail time. In some cases, they were not even subject to deportation at the time they were convicted. In others, they faced possible deportation, but would have been able to apply for 212(c) relief before immigration judges who would have heard their cases.

These individuals and their families now face their worst nightmare. After living, working, and traveling as lawful permanent residents for years, many now face mandatory deportation for their old convictions unless they are given the opportunity to apply for 212(c) relief. Others could be detained indefinitely if the INS is unable to deport them to their home countries. Many immigrated to the United States as young children and do not even

speak, read, and write the language of the country in which they were born.

For many permanent residents, the timing of when the INS initiated proceedings precluded them from 212(c) relief. Because many of these individuals were deportable at the time of their conviction, the INS could have started immigration proceedings prior to AEDPA's passage in 1996. If it had done so, these individuals would today be unquestionably eligible for 212(c) relief.

ARGUMENT

I. THE RETROACTIVE ELIMINATION OF INA § 212(c) WOULD BE A RADICAL CHANGE IN IMMIGRATION LAW AFFECTING A WIDE RANGE OF DESERVING LAWFUL PERMANENT RESIDENTS, INCLUDING VETERANS, SPOUSES AND PARENTS OF U.S. CITIZENS, BUSINESS OWNERS, AND COMMUNITY LEADERS.

A. The Retroactive Elimination of 212(c) Would Require the Deportation of Valuable Members of Society.

Many lawful permanent residents with pre-AEDPA convictions are productive members of society who merit the opportunity to apply for 212(c) relief. Some, like Javier Guevara, have spent countless hours helping others and improving their communities. Despite being disabled, Mr. Guevara has dedicated numerous hours to volunteering on the Pascua Yaqui Reservation, donating his time and skills renovating old buildings. The tribe considers him such an asset to his community that the

Tribal Council passed a five-page resolution urging the government not to deport him.

Individuals with pre-AEDPA convictions are also business owners. They work, pay taxes, and support their families. Emma Mendez de Hay started a successful restaurant business and is the primary supporter of her children. Both Charlie Jaramillo and Ihsan Dawlett had their own construction businesses for years, and Jose Velasquez owned a Philadelphia deli.

Finally, individuals with pre-AEDPA convictions are veterans who have risked their lives in service of our nation. Luis Perez, for example, was a Marine corporal in the Vietnam War.

A wide range of deserving permanent residents stand to be affected by the retroactive elimination of 212(c) relief. Our nation's communities will lose valuable members if individuals with pre-AEDPA convictions are not given an opportunity to apply for such relief.

B. Elimination of 212(c) Relief for Permanent Residents with Pre-AEDPA Convictions Would Convert the Mere Possibility of Deportation Into Mandatory Deportation, Even for Individuals with Minor Crimes.

For many individuals like Mr. St. Cyr, the effect of being barred completely from 212(c) relief means *mandatory*, not possible, deportation. Those individuals whom the INS cannot deport to their home countries could be

held in indefinite detention.[57] The radical nature of the retroactive elimination of 212(c) relief cannot be overstated. Relief under INA § 212(c) is the only permanent relief available to permanent residents with aggravated felony convictions.[58] Because the aggravated felony definition now includes minor crimes and crimes with probation or suspended sentences, many permanent residents have been transformed into "aggravated felons."

In AEDPA and again in IIRIRA, Congress greatly expanded the type of crimes that qualify as aggravated felonies. Under the current definition, crimes that are neither aggravated nor felonies under criminal law nevertheless qualify as "aggravated felonies" under immigration law. For example, theft offenses with one-year suspended sentences are aggravated felonies. *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2001) (theft offenses with a one-year term of imprisonment are aggravated felonies); INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2001) ("term of imprisonment" includes suspended sentences).

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[57] The INS is detaining approximately 5,000 people, including former permanent residents, who cannot be deported because their countries will not accept them. *See Catholic Legal Immigration Network, Inc., The Needless Detention of Immigrants in the United States*, Report 4, Aug. 2000, at 45 (visited March 25, 2001) <http://www.cliniclegal.org/atriskrpt.htm> (username: clinicsf, password: 94104). The Court is currently reviewing the legality of this detention. *See Ashcroft v. Ma*, No. 00-38 (oral argument held Feb. 21, 2001).

[58] Congress in IIRIRA renamed 212(c) relief as "cancellation of removal" but barred all aggravated felons from this relief. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2001).

Misdemeanors can be aggravated felonies. *See Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (attempted stealing of tire rims with a suspended sentence over a year is an aggravated felony); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor theft of $10 video game with one-year suspended sentence is an aggravated felony). Low level assault and battery offenses can also be aggravated felonies. *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2001); *see also U.S. v. Holguin-Enriquez*, 120 F.Supp. 2d 969 (D.Kan. 2000) (assault in violation of municipal ordinance with one year suspended sentence is an aggravated felony).

The retroactive elimination of 212(c) would have some of its harshest effects on individuals prosecuted for relatively minor crimes that carried minimal sentences. People like Rick Siridavong and Carlos Garcia pled guilty to minor theft offenses and assumed that they would be able to go on with their lives. Mr. Siridavong received a two-year suspended sentence and community service for taking a car radio with some friends. He never spent any time in jail until INS arrested him at his home after he applied for citizenship. At the time that he was convicted, Mr. Siridavong was not even subject to deportation. Now he is an "aggravated felon" and, according to the INS, ineligible for any relief from deportation.

Mr. Garcia finds himself in a similar situation. He received a two-year suspended sentence for taking $200 dollars from the department store where he worked. Like Mr. Siridavong, Mr. Garcia never spent any time in jail and was not deportable at the time of his crime. Now he is an "aggravated felon" who faces deportation unless he is given the opportunity to file for 212(c) relief.

The only permanent relief available to lawful permanent residents like Mr. Siridavong and Mr. Garcia is INA § 212(c). While individuals who fear return to their home countries may be eligible for other relief, this relief is temporary and falls far short of permanent residency. Moreover, no other type of relief available to aggravated felons allows the applicant to present evidence of rehabilitation and family hardship.[59]

C. The Retroactive Elimination of 212(c) Relief Will Result in Extreme Hardship to Spouses, Children, and Parents Who are U.S. Citizens.

Deserving lawful permanent residents with pre-AEDPA convictions are not the only people who would suffer from the elimination of 212(c) relief. The family members of these permanent residents, many of whom are U.S. citizens, would also experience devastating hardship.[60]

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[59] Some permanent residents with aggravated felony convictions may qualify for relief under withholding of removal, INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2001), and Article 3 of the Convention Against Torture, but relief under these provisions is temporary and very different from permanent residency. Unlike permanent residents, individuals granted withholding can be deported if conditions in their home countries change. *See* 8 C.F.R. § 208.23(b). The differences between permanent residency and relief under Article 3 of the Convention Against Torture are even more marked. Deferral under Article 3 is only temporary, confers no lawful immigration status whatsoever, and individuals granted deferral are not necessarily released from detention. *See* 8 C.F.R. § 208.17.

[60] *See* Symposium, *United States Immigration Policy at the Millennum: Understanding the Impact of the 1996 Deportation Laws*

The threat of losing a family member to deportation has already had a severe negative impact on the families of the individuals discussed in this brief. The children of Emma Mendez de Hay, all of whom are U.S. citizens, have been particularly hard hit by the possibility that their mother will be deported. Ms. Mendez de Hay's 20-year-old daughter was an honors student at Pierce College before her mother was detained. While her mother was in detention, she had to drop out of school to work two jobs in order to support her younger brothers. Ms. Mendez de Hay's 11-year-old son, a child with special needs, battled depression and repeatedly talked about wanting to die. Ms. Mendez de Hay's 14-year-old has had problems in school.

The case of Ihsan Elias Dawlett provides another example. Ever since Mr. Dawlett lost his wife of 27 years in 1996, he has taken care of his son Firas, a U.S. citizen born with Down's Syndrome. Mr. Dawlett and his son are exceptionally close. Although Firas is now 26, he still lives with and depends on his father. Mr. Dawlett attends to Firas's everyday needs and takes him to a school for people with special needs. While Mr. Dawlett was in INS detention, Firas became withdrawn and cried constantly for his father. Because Firas is so dependent on Mr. Dawlett, the impact of losing his father to deportation would be particularly severe. Unless 212(c) relief is made available to Mr. Dawlett, Firas stands to lose his caretaker.

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and the Limited Scope of Proposed Reforms, 113 Harv. L. Rev. 1950 (2000) (discussing family hardships caused by deportation).

II. MANY PERMANENT RESIDENTS WITH PRE-AEDPA CONVICTIONS WOULD TODAY BE UNQUESTIONABLY ELIGIBLE FOR 212(c) RELIEF IF THE INS HAD STARTED PROCEEDINGS BEFORE AEDPA.

Many of the lawful permanent residents who will be affected by the outcome of Mr. St. Cyr's case have old criminal convictions. For years, they have lived, worked, traveled, and raised families without any threat of deportation. Although for years the INS did not seek to deport these individuals, it has now placed them in immigration proceedings. If these individuals had been in proceedings before AEDPA, they would have been given the opportunity to apply for 212(c) relief. Now these permanent residents face mandatory deportation based solely on when INS initiated proceedings against them.

In many cases, extraordinary lengths of time passed between the individual's conviction and the INS's commencement of proceedings. In Jose Velasquez's case, 18 years passed between his 1980 conviction and the date the INS placed him in proceedings. Because Mr. Velasquez has a drug conviction, the INS could have sought his deportation at the time he was convicted. Moreover, the INS had numerous contacts with Mr. Velasquez when he sought reentry after multiple trips abroad. Although the INS could have sought Mr. Velasquez's deportation at the time that 212(c) was still part of the INA, it did not and instead waited until 1998. Mr. Velasquez now faces mandatory deportation unless he is given the opportunity to file for 212(c) relief.

The INS waited even longer in the case of Jerry Arias-Agramonte. Mr. Arias was deportable for his drug offense in 1977 but the INS did not place him in proceedings for over 20 years.

Many of the individuals whose lives hinge on the outcome of Mr. St. Cyr's case made mistakes in the past but are now well-respected and valuable members of society. Their deportation would have a devastating effect on American families and communities. Longtime permanent residents with pre-AEDPA convictions should not be deprived of the right to file for 212(c) relief solely because the INS started proceedings against them after AEDPA was enacted.

CONCLUSION

Amici curiae urge the Court to affirm the decision of the Court of Appeals of the Second Circuit.

Respectfully submitted,

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APPENDIX A

Immigration and Refugee Services of America (IRSA)

IRSA is a national, nonprofit, nonsectarian agency with an 84-year history of service to refugees, asylum seekers, and other newcomers to the United States. IRSA is one of the contracting partners of the State Department's Bureau of Population, Refugees, and Migration. Through a network of 34 partner agencies nationwide, IRSA provides resettlement, legal representation, and other services to asylum seekers and immigrants. Because IRSA and its partner agencies work in a variety of capacities with immigrants and their families, IRSA has witnessed the devastating impact of the retroactive elimination of 212(c) relief on permanent residents and their families.

Union of Needletrades, Industrial & Textile Employees, AFL-CIO (UNITE)

UNITE represents apparel and textile workers in the United States, Puerto Rico, and Canada. Many of its members were born outside the United States. UNITE, through its Immigration Project, provides immigration legal services to members and their families. Many UNITE members have close relatives who would experience the harsh consequences of the retroactive elimination of INA § 212(c).

The Hebrew Immigrant Aid Society (HIAS)

HIAS is America's oldest international migration and refugee resettlement agency. HIAS is dedicated to assisting persecuted people worldwide and delivering them to

countries of safe haven. In its 120 years of existence, HIAS has rescued more than 4.5 million people. HIAS oversees the resettlement of refugees in the United States through a network of Jewish communal agencies. HIAS also provides direct immigration legal services in the New York metropolitan area to detained asylum seekers and immigrants. HIAS is concerned that the retroactive application of the 1996 amendments would result in the forced separation of families.

Lawyers' Committee for Civil Rights Under Law of Texas (Texas Lawyers' Committee)

Texas Lawyers' Committee is a nonpartisan, nonprofit law firm founded in 1991 and committed to attaining and preserving civil rights for immigrants and refugees throughout Texas. The Texas Lawyers' Committee has represented numerous individuals with pre-AEDPA convictions who now face mandatory deportation because of the INS's retroactive application of the 1996 amendments to their cases.

Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)

CHIRLA is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. CHIRLA aims to foster greater understanding of issues affecting immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change. Through this work, CHIRLA has observed the tremendous negative impact that the INS's retroactive

elimination of 212(c) relief has had on permanent residents and their families.

Florence Immigrant and Refugee Rights Project (Florence Project)

The Florence Project is a nonprofit organization that provides free legal assistance to INS detainees in Arizona. Since the 1996 amendments, we have seen the detainee population increase tremendously. Many of the individuals the Florence Project counsels are longtime lawful permanent residents with pre-AEDPA convictions who would have been eligible to apply for 212(c) relief prior to the 1996 amendments. Because of the INS's retroactive application of these amendments, these individuals now face mandatory deportation.

Northwest Immigrant Rights Project (NWIRP)

NWIRP is a nonprofit organization committed to defending and advancing the rights and dignity of low-income immigrants and refugees in Washington state through community education, advocacy, and immigration legal services. Many of those NWIRP serves have been directly affected by the INS's retroactive application of the 1996 amendments eliminating 212(c) relief. In NWIRP's experience, the INS's threat of mandatory deportation has caused extreme distress to permanent residents and their families.

Coalition for the Human Rights of Immigrants (CHRI)

CHRI is an organization of immigrants and advocates formed in October 1997 to confront anti-immigrant policies through grassroots education and action in the New York City area. Through CHRI's community interactions, CHRI has witnessed the harsh effects of the retroactive bars to 212(c) relief created by the 1996 immigration laws.

Washington Alliance for Immigrant and Refugee Justice (WAIRJ)

WAIRJ is a statewide alliance of organizations and individuals and a leading source of organizing and advocacy on immigration issues in Washington state. WAIRJ has direct contact with permanent residents and their families who are affected by the 1996 amendments. In WAIRJ's experience, INS's retroactive elimination of 212(c) has had a devastating effect on lawful permanent residents and their families.

Heartland Alliance/Midwest Immigrant and Human Rights Center (MIHRC) (formerly known as Travelers & Immigrants Aid)

MIHRC is a nonprofit organization providing legal services to low-income immigrants in the Greater Chicago area. MIHRC regularly conducts presentations to community organizations and the private and criminal bar concerning the immigration consequences of crimes and the

eligibility requirements for 212(c) relief. MIHRC represents individuals who are applicants for 212(c) relief or who would be eligible for such relief but for the INS's retroactive application of the 1996 amendments to their cases.

APPENDIX B

INDEX OF DOCUMENTS
LODGED WITH THE COURT

Documents Relating to Ihsan Elias Dawlett Page

Copy of Photograph of Firas Dawlett L-1

Letter of Counsel Peter Williamson (Jan. 28, 1999) ... L-2

Letter of Ali Hasoon (Jan. 14, 1999)..... L-5

Letter of Sam Delly (Jan. 14, 1999)..... L-6

Letter of Dr. Moayyad Ezzat (Jan. 15, 1999)..... L-7

Letter of Mrs. Claire Hollins, Director, Hope Village (Jan. 12, 1999) L-8

Letter of Dawlett and Bashar Dawlett (Feb. 1, 1999)..... L-9

Documents Relating to Emma Mendez De Hay

Letter of Counsel Erik Bauer (Feb. 3, 2000)..... L-12

Statement of Vanessa Dalia Hay L-13

Statement of Professor Alan R. Kemp (Nov. 5, 1999)..... L-14

Statement of Esmeralda Mendez (Nov. 9, 1999).... L-15

Report from Sea Mar Community Health Center (Feb. 4, 2000)..... L-16

Documents Relating to Luis Perez

Decision and Order on a Motion to Terminate, *In the Matter of Luis Jose Bolivar Nicanor Perez-Portes, Case No. A10 262 585,* Immigration Judge Victoria Ghartey (Sept. 11, 2000) L-18

Documents Relating to Vongphachanh "Rick" Siridavong

Letter of Sheila Ellis (July 9, 1999) L-26

Documents Relating to Javier Guevara

Respondent's Brief Regarding Eligibility for a Waiver of Deportability Under INA § 212(c) and Motion to Hold in Abeyance Pending Supreme Court Decision, *In the Matter of Guevarra-Sierra, Javier A#92-383-609* (Mar. 2, 2001) L-27

Letter of Bernie Montiel (Mar. 14, 2001) L-36

Resolution of the Pascua Yaqui Tribe (Mar. 15, 2001) L-37

Documents Relating to Carlos Garcia

Letter of Carlos Garcia (Feb. 12, 1999) L-41

Motion for Relief, *In re Carlos Garcia, File No. A37-303-717* (Dec. 1, 1999) L-44

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Supreme Court of the United States

Immigration and Naturalization Service,
Petitioner,

vs.

Enrico St. Cyr,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page(s)

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AT COMMON LAW IN ENGLAND, *HABEAS CORPUS* WAS AVAILABLE GENERALLY TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE NATURE OF THE ILLEGALITY ASSERTED 4

A. Case Law and Commentaries Demonstrate the General Availability of the Writ to Challenge the Legality of Civil Confinement 4

1. *By the Eighteenth Century,* Habeas Corpus *Was Established as a General Remedy for Unlawful Detention, Whether Civil or Criminal* 4

2. *Eighteenth Century Courts Granted the Writ to Review the Legality of Detention in a Wide Range of Civil Contexts* 5

a. Habeas Corpus *as a Remedy Against Impressment* 5

b. Habeas Corpus *as a Remedy Against Civil Detention by Executive Bodies and Inferior Courts* 5

c. Habeas Corpus *as a Remedy in Slavery Cases* 7

d. Habeas Corpus *as a Remedy Against Other Forms of Non-criminal Confinement* 8

3. *The Scope of* Habeas *Review in the Eighteenth Century Encompassed Questions of Law, Including Questions of Statutory Interpretation* 8

4. *At Common Law, the Writ of* Habeas Corpus *Ran Throughout the Sovereign's Territory and Applied to All Persons Present Therein, Including Aliens* 10

B. The Eighteenth and Early Nineteenth Century History of *Habeas Corpus* Legislation in England Reflects a General Understanding That Civil Habeas Was Available to Review Executive Detention at Common Law 11

1. *The* Habeas Corpus *Act of 1679* 11

2. *The* Habeas Corpus *Bill of 1758* 12

3. *The* Habeas Corpus *Act of 1816* 15

II. IN COLONIAL AND EARLY POST-COLONIAL AMERICAN LAW, *HABEAS CORPUS* WAS GENERALLY AVAILABLE TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE NATURE OF THE ILLEGALITY ASSERTED 15

A. *Habeas Corpus* As Known In England Was Fully A Part of Early American Law 16

B. In the Post-Colonial Era, *Habeas Corpus* Was As Broad and Effective a Remedy As in England 17

1. *The Founders Enshrined* Habeas Corpus *in its Full Width and Effect* 18

2. *Post-Colonial Case Law Evidences The Wide and General Application of* Habeas Corpus *To Review Questions of Law* 19

a. Habeas *as a Remedy for Indentured Servants* 20

b. Habeas *As Applied in Civil Debtor Cases* 21

c. Habeas *To Redress Unlawful Military Enlistment* 22

d. Habeas *Relief For Deserters From Foreign Ships* 25

e. Habeas *as a Remedy Against Other Forms of Civil Confinement* 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — PAGE(S)

Attorney General v. Fenton, 19 Va. (5 Munf.) 292 (Va. 1816) 21

Bamfield v. Abbot, 2 F. Cas. 577 (D. Mass. 1847) 24

Bank of U.S. v. Jenkins, 18 Johns. 305 (N.Y. Sup. Ct. 1820) 21

Ex parte Boggin, 104 Eng. Rep. 484 (K.B. 1811) 5

Bushell's Case, 69 124 Eng. Rep. 1006 (C.P. 1670) 6

Calvin's Case, 77 Eng. Rep. 377 (1608) 10-11

In re Carlton, 7 Cow. 471 (N.Y. Sup. Ct.1827) 24

C'wealth v. Alexander, 6 Binn. 176 (Pa. 1813) 21

C'wealth v. Cornman, 4 Binn. 483 (Pa. 1812) 21

C'wealth v. Cushing, 11 Mass. (11 Tyng) 67 (Mass. 1814) 23

C'wealth v. Downes, 41 Mass. (24 Pick.) 227 (Mass. 1836) .. 18, 24

C'wealth v. Edwards, 6 Binn. 202 (Pa. 1813) 20

C'wealth v. Harrison, 11 Mass. 63 (Mass. 1814) 25

C'wealth v. Holloway, 1 Serg. & Rawle 392 (Pa. 1815) 25

C'wealth v. Keeper of Jail, 4 Serg. & Rawle 505 (Pa. 1818) 21

C'wealth ex rel. Kerr v. Brady, 3 Serg. & Rawle 309 (Pa. 1817) 26

C'wealth ex rel. Lewis v. Holloway, 6 Binn. 213 (Pa. 1814) 27

C'wealth ex rel. Menges v. Camac, 1 Serg. & Rawle 87 (Pa. 1814) 23

C'wealth v. Morey, 8 Mass. (8 Tyng) 78 (Mass. 1811) 26

C'wealth v. Murray, 4 Binn. 487 (Pa. 1812) 23

C'wealth ex rel. Stephenson v. Vanlear, 1 Serg. & Rawle 248 (Pa. 1814) 20

C'wealth v. Waite, 19 Mass. (2 Pick.) 445 (Mass. 1824) 21

C'wealth v. Ward, 4 Mass. (4 Tyng) 497 (1808) 26

C'wealth ex rel. Webster v. Fox, 7 Pa. 336 (Pa. 1847) 24

Davis v. Coburn, 8 Mass. 299 (Mass. 1811) 20

Case of the Deserters from the British Frigate L'Africaine, 3 Am. L.J. 132 25

Discharge of Richardson, Worcester Sup. Jud. Ct., Mass., Sept., 1800 ..... 21, 22

Dr. Groenvelt's Case, 91 Eng. Rep. 1038 (K.B. 1702) 6

Elkison v. Deliesseline, 8 F. Cas. 493 (Cir. Ct. D. S.C. 1823) ... 27

Ex parte D'Olivera, 7 F. Cas. 853 (Cir. Ct. D. Mass. 1813) .. 18, 26

Ex parte Drydon, 101 Eng. Rep. 235 (K.B. 1793) 5

Fitzpatrick v. Neal, 3 N.C. (2 Hayw.) 8 (N.C. 1797) 21

Gardener's Case, 78 Eng. Rep. 1048 (K.B. 1600) 6

Goldswain's Case, 96 Eng. Rep. 711 (C.P. 1778) 5

In re Goodenough, 19 Wis. 274 (1865) 20

Gusty v. Diggs, 11 F. Cas. 128 (Cr. Ct. D.C. 1820) 20, 21

Hetley v. Boyer, 79 Eng. Rep. 287 (K.B. 1613) 6

Case of Hippolyte Dumas, 2 Am. L.J. 86 25

Hite v. Fitz-Randolph, 3 Va. (1 Va. Cas.) 269 (1812) 26

Hollingshead's Case, 91 Eng. Rep. 307 (K.B. 1702) 6

Case of The Hottentot Venus, 104 Eng. Rep. 344 (K.B. 1810) ... 10

Kennedy & Co. v. Fairman, 2 N.C. (1 Hayw.) 408 (N.C. 1796) 21

Lister's Case, 88 Eng. Rep. 17 (K.B. 1721) 8

Ex parte Mason, 5 N.C. (1 Mur.) 336 (N.C. 1809) 23

In re McDonald, 16 F. Cas. 33 (D. Mass. 1866) 24

McMullen v. Charleston, 1 S.C.L. (1 Bay) 46 (S.C. 1787) 27

Ex parte McNeil, 6 Mass. 245 (Mass. 1810) 21

Ex parte Minor, 17 F. Cas. 457 (Cir. Ct. D.C. 1823) 26, 27

Oakes, 8 Monthly Law Reporter (Sup. Jud. Ct. Mass. 1845) 27

In re Pederson, 19 F. Cas. 91 (S.D.N.Y. 1851) 25

Ex parte Pool, 4 Va. (2 Va. Cas.) 276 (1821) 25

R. v. Delaval, 97 Eng. Rep. 913 (K.B. 1763) 8

R. v. Lee, 83 Eng. Rep. 482 (K.B. 1676) 8

R. v. Nathan, 93 Eng. Rep. 914 (K.B. 1724 [reported 1730]) 8

R. v. Schiever, 97 Eng. Rep. 551 (K.B. 1759) 10

R. v. Stapylton (K.B. 1771) 10

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STATEMENT OF INTEREST[1]

The first question herein is whether the federal courts may review Respondent's statutory retroactivity claim on *habeas corpus*. *Amici curiae* are professors of legal history at law schools and universities in the United States and England with expertise in English legal history prior to 1789 and/or early American legal history. The professional interest of *amici curiae* legal historians is in ensuring that the Court is fully and accurately informed respecting the historical precedent, understandings and evidence regarding the scope and availability of the writ of *habeas corpus* that, under this Court's precedents, are properly considered in evaluating the issues raised under the Suspension Clause. U.S. Const., Art I, § 9, cl. 2. The people whose lives and writings *amici curiae* study, including the generation which drafted this country's Constitution, considered *habeas corpus* a great bulwark of personal freedom, and unquestionably the Framers, educated in English law, drew on their common law comprehension when they prohibited suspension of the writ. *Amici curiae* have no personal, financial, or other professional interest, and take no position, respecting the other issues raised in the case at bar.

SUMMARY OF ARGUMENT

Respondent Enrico St. Cyr asserts that he is in custody and subject to deportation by the Immigration and Naturalization Service ("INS") based on the agency's misinterpretation of its organic statute, the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et. seq*. Mr. St. Cyr contends that Congress, in amending the immigration statutes in 1996 to eliminate certain forms of discretionary relief from deportation, did not intend the amendments retroactively to render him ineligible for relief based

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1 *Amici* state that no party or its counsel has authored this brief in whole or in part, nor has any person or entity other than *amici* and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this Brief have been lodged with the Clerk of this Court. Sup. Ct. R. 37.6.

on conduct or convictions that predated the 1996 laws. The administrative courts rejected Mr. St. Cyr's statutory interpretation and refused to consider his application for relief. In his petition for a writ of *habeas corpus*, Mr. St. Cyr asked that a U.S. district court judge adjudicate his statutory retroactivity claim and determine the lawfulness of his custody by the Executive branch.

The INS responds that no judge may consider Mr. St. Cyr's statutory claim, on *habeas* petition or otherwise. In her opening brief, the Acting Solicitor General argues that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") requires, and the Constitution permits, the conclusion that no court can review the agency interpretation of the relevant provision, even if, as Mr. St. Cyr claims, that interpretation is incorrect and therefore results in Respondent's unlawful detention and deportation.

The Acting Solicitor General maintains that this conclusion is consistent with the Suspension Clause because "non-constitutional" claims such Mr. St. Cyr's statutory retroactivity claim are "well removed" from the "core of the Great Writ." (Brief for Petitioner at 27, 28.) The government in its brief reviews late nineteenth century and early twentieth century challenges to deportation orders and discerns "four kinds of challenges" that are concededly subject to judicial review: (1) where the person detained was a citizen, not an alien; (2) for an alien deprived of a "fundamentally fair administrative proceeding"; (3) where the factual finding of deportability was "completely without supporting evidence"; and (4) where the case did not fall within any statutory category for deportation. *Id.* at 30.

The historical evidence set forth below shows, however, that whenever a deprivation of liberty was predicated upon determination of a question of law, that determination was reviewable on *habeas*. *Amici curiae* are unaware of evidence that either the English common law or early American *habeas* practice recognized the sort of parsing of legal claims urged by the government here. Rather, the historical evidence indicates that the

statutory interpretation claim raised by Respondent falls within the scope of *habeas corpus* at common law.

1. The writ of *habeas corpus* was available to persons subject to civil detention in a wide range of contexts in England prior to 1789. The INS may be analogized to eighteenth century executive agencies such as the British Navy, administrative bodies such as the Sewer Commissioners, or courts of "inferior" (limited) jurisdiction. As both case law and commentaries confirm, unlawful detention by any such bodies could be corrected upon issuance of *habeas corpus*. The Great Writ was available to non-enemy aliens and citizens alike. *Habeas* was commonly granted where a detention was grounded on an error of law, including an error of statutory interpretation. *Habeas* was never fettered by any requirement that the error go to the jurisdiction of the decision-maker who decided to detain petitioner. Moreover, any distinction between constitutional and non-constitutional errors was unknown to English law and *habeas corpus* in the English courts. Legislative efforts to reform *habeas* procedure in England in the late seventeenth to early nineteenth centuries also uniformly assumed the broad availability of the writ to correct errors of law that resulted in civil detention by the government.

2. Similarly, early American courts commonly utilized *habeas* to resolve disputes of law, including disputes of statutory construction, raised by petitioners detained civilly. American common law also extended such remedies to non-citizens. Early American jurists who interpreted statutes on *habeas* challenges to civil confinement included John Marshall, Joseph Story, and Lemuel Shaw. Further, while the distinction between constitutional and non-constitutional errors of law does have meaning in the American historical context, it does not appear to have ever been used to confine to constitutional errors the scope of *habeas corpus* in cases of civil, Executive branch detention.

ARGUMENT

I.
AT COMMON LAW IN ENGLAND, *HABEAS CORPUS* WAS AVAILABLE GENERALLY TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE NATURE OF THE ILLEGALITY ASSERTED

A. Case Law and Commentaries Demonstrate the General Availability of the Writ to Challenge the Legality of Civil Confinement

1. *By the Eighteenth Century,* Habeas Corpus *Was Established as a General Remedy for Unlawful Detention, Whether Civil or Criminal*

The writ of *habeas corpus* originated as a judicial development in the common law and Chancery courts of England.[2] It was known to the common law as early as the fifteenth century, and was used to test the validity of executive committals in numerous sixteenth century cases.[3] The functions of the early writ were varied and included relief from detention that, in modern

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2 As noted below (*see infra*, I.B), *aspects* of habeas corpus practice, particularly in criminal cases, were affected by seventeenth-century and later legislation. The broader common law writ, however, lived outside statute, and had earlier origins.

3 *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 6-8 (2d ed. 1989); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT (2d ed. 1876) (reprint, Da Capo Press, 1972); 9 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 104-25 (2d ed. 1938) (Methuen & Co., Sweet & Maxwell, 1966 reprint); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129-38 (1st ed. 1765-1769) (facsimile reprint, Univ. of Chicago Press, 1979).

terms, was civil in nature. Any person contending that he or she was unlawfully detained or confined could petition for *habeas corpus*. The petition could also be filed by the legal custodian of the person confined. The recipient of the writ (the alleged confiner) was then required to file a return stating the legal basis for the detention. The broad scope of *habeas corpus* was widely recognized; as Chief Justice Coke observed in his *INSTITUTES*, the writ extended to all detention "contra legem terrae," *i.e.*, against the laws of the land, whether civil or criminal, 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (1642 ed.) (William S. Hein Co. 1986). Blackstone described *habeas corpus* as the "the bulwark of the British Constitution," 4 BLACKSTONE'S COMMENTARIES 438, and stated that the writ was "efficacious . . . in all manner of illegal confinement," 3 BLACKSTONE'S COMMENTARIES at 131.

2. *Eighteenth Century Courts Granted the Writ to Review the Legality of Detention in a Wide Range of Civil Contexts*

a. Habeas Corpus *as a Remedy Against Impressment*

Judges used *habeas corpus* on numerous occasions to redress the unlawful impressment of sailors into the British Navy. *See, e.g., R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (King's Bench discharging a seaman upon determining he was statutorily exempt from impressment); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (writ used to challenge a sailor's impressment); *Ex parte Drydon*, 101 Eng. Rep. 235, 236 (K.B. 1793) (Kenyon, C.J.) (holding the naval recruitment statute was subject to an exception, and therefore discharging the sailor). *Habeas* review of impressment cases enabled not only review of the state's compliance with statutory enlistment rules but also review of executive decisions. *Ex parte Boggin*, 104 Eng. Rep. 484, 484 n.(a) (K.B. 1811) (reference to *Chalacombe's Case*--*habeas* issued on behalf of impressed master of a coal vessel, despite opposition by counsel for Admiralty on grounds that exemptions for "seafaring men of this description" were given only by "grace and favour," not "of right").

b. Habeas Corpus *as a Remedy Against Civil Detention by Executive Bodies and Inferior Courts*

The Great Writ was used to review actions by inferior courts of record, as well as commissions and tribunals which affected the liberty of the subject. Thus, actions by the London Court of Sessions,[4] the bankruptcy commissioners,[5] the College of Physicians in its malpractice jurisdiction over doctors,[6] the decisions of justices of the peace[7] and of the Sewers Commission sitting as a court of record[8] were all reviewable upon the return of *habeas corpus*.

This inherent and wide-ranging supervisory jurisdiction can properly be analogized to the very kind of review sought in the

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4 *See Bushell's Case*, 69 124 Eng. Rep. 1006, 1016 (C.P. 1670) (*habeas corpus* granted to discharge a juror who had been committed for contempt by London Court of Sessions for voting to acquit).

5 *Hollingshead's Case*, 91 Eng. Rep. 307 (K.B. 1702) (prisoner discharged; bankruptcy commission had failed to adhere to statute); *R. v. Nathan*, 93 Eng. Rep. 97, 914 (K.B. 1724 [reported 1730]), (*habeas* applied to a commitment by bankruptcy commissioners).

6 *Dr. Groenvelt's Case*, 91 Eng. Rep. 1038 (K.B. 1702) (holding that statute empowering College of Physicians to fine did not abrogate royal pardon power).

7 *Gardener's Case*, 78 Eng. Rep. 1048 (K.B. 1600) (review of question of whether justice of the peace properly interpreted firearms statute).

8 *Hetley v. Boyer*, 79 Eng. Rep. 287 (K.B. 1613) (discharging individual imprisoned for refusing to release a suit to challenge taxation system used by the Commission to finance project; holding such taxation system to be invalid).

present case, *i.e.*, review by an Article III court over the activities of Article I specialized tribunals, the Board of Immigration Appeals and Immigration Judges. "Under the common law definition, both immigration judges and the BIA qualify as inferior courts because their jurisdiction is specialized and limited. In certain respects, immigration tribunals are like the King's conciliar courts, the extensive power of which the common law courts sought to supervise through *habeas corpus*." Jonathan L. Hafetz, *Note: The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2538 (1998) (footnote omitted).

c. Habeas Corpus *as a Remedy in Slavery Cases*

The writ of *habeas corpus* supplied the jurisdictional basis for the landmark emancipation case, *Somerset v. Stewart*, 20 Howell's State Trials 1, 79-82 (K.B. 1772). There, a writ was issued to bring up the body of James Somerset, an African slave who had been purchased by defendant Charles Stewart in Virginia. Somerset was confined on board a ship lying in English waters, about to depart for Jamaica. The Chief Justice, Lord Mansfield, ruled that the only question was "whether the cause of detention upon the return was sufficient," and since there was no authority under English law to force a slave out of the country, "the black must be discharged." James Oldham, *New Light on Mansfield and Slavery*, 27 JOUR. OF BRITISH STUDIES 45, 56-58 (1988) (quoting from the Hill manuscript).

Habeas corpus also won a discharge in February 1771 for another slave, Thomas Lewis, who otherwise would have been sent off by his master to Jamaica to be sold. *See R. v. Stapylton*, transcribed at 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1225-28 (1992); *see also id.* at 1242 (discussion). During the Lewis case, Lord Mansfield also noted that he had granted writs of *habeas corpus* preventing the impressment of slaves in two or three cases on the basis of affidavits of their masters. PRINCE HOARE, MEMOIRS OF GRANVILLE SHARP 59 (1820).

d. Habeas Corpus *as a Remedy Against Other Forms of Non-criminal Confinement*

Judges provided relief from private civil detention in a diverse range of cases on *habeas* petitions. One common type involved family disputes. In *R. v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763), a *habeas* writ supported by affidavits from parents produced an inquiry into the state of their daughter, who had been apprenticed at age fifteen to a music master, but who had been handed over to defendant to become his mistress. Lord Mansfield approved this use of the writ and mentioned three other cases "of writs of *habeas corpus* directed to private persons, 'To bring up infants.'" *Id.* at 914. In *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761), the writ was issued to the keeper of a private "mad-house" to bring into court a woman who had been placed in the asylum by her husband. (The court first ordered that a medical examination of the woman be conducted, and on receiving an affidavit from the examining doctor that the woman appeared perfectly sane, the writ was ordered. The woman appeared in court, though no return to the writ was made.) *See also R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (reviewing husband's detention of wife, but refusing relief); *Lister's Case*, 88 Eng. Rep. 17, 17 (K.B. 1721) (reviewing detention, releasing wife whose husband "[took] her violently into his custody").

3. *The Scope of* Habeas *Review in the Eighteenth Century Encompassed Questions of Law, Including Questions of Statutory Interpretation*

As Chief Justice Coke stated, *habeas* review was generally available to provide relief against detention contrary to the laws of the land. Questions of statutory interpretation, along with questions of common law, were properly and frequently addressed on *habeas*. A common use of *habeas* was in connection with the bankruptcy statutes. In *R. v. Nathan*, 93 Eng. Rep.914 (K.B. 1724 [reported 1730]), for example, the bankruptcy commissioners concluded that defendant, on his examination under oath, "had notoriously prevaricated." They had committed him to the Fleet

Prison without bail until they had resolved his estate or until he "be otherwise delivered by due course of law." *Id.* On a *habeas* petition, the court ruled, *per curiam*, that the statute required questions be put to the bankrupt in writing and that he be given time to consider his answer, adding: "It is very dangerous to let people depart from the words of the Act." *Id.* Since the commitment did not conform to the words of the statute, defendant was discharged.

Common law judges in eighteenth-century England disagreed about the extent to which the truth of facts asserted in a return of a writ could be examined by the court in a *habeas* hearing without being put before a jury. This was one of the issues debated by Parliament on the unsuccessful 1758 *habeas corpus* bill and dealt with in the 1816 Act. (*See infra*, pp 12-15). Because the legal merits of Respondent's statutory interpretation claim in the present case can be determined on the basis of undisputed facts -- in eighteenth century terms, on the face of the return -- that difference of views is not pertinent to the case at bar.

The common law courts *were* careful, however, to preserve and examine the legal merits of a *habeas* petition, even if this required procedural maneuvering to enable relevant statutory interpretation to become reviewable. For example, in a King's Bench impressment case in June 1777, the court considered how to take up the merits of the *habeas* petitioner's claim that he was statutorily exempt. Lord Mansfield observed that, "this writ is an antient and constitutional writ; it must go in its original form, without bending to particular purposes," but after discussion:

> At last, Lord Mansfield, with great respect to the gentlemen of the bar, proposed to them this question, "Whether any harm could result from this mode, if adopted, viz. For the Crown Lawyers to return the writ of Habeas Corpus, that Mellichip, being a liveryman serving upon the river Thames, had been impressed into his Majesty's service, having no legal exemption." This, his Lordship said, would give the gentleman

> on the other side an opportunity of suggesting, that he had an exemption, such as the charter of the City, constant, invariable, immemorial usage, or whatever plea might be alleged. This being entered on the record, might lead to a compleat investigation of the whole matter in view. To which proposal all parties seemed to acquiesce.

MORNING CHRONICLE, June 18, 1777, *quoted in* 1 MANSFIELD MANUSCRIPTS, 78.

4. *At Common Law, the Writ of* Habeas Corpus *Ran Throughout the Sovereign's Territory and Applied to All Persons Present Therein, Including Aliens*

The writ applied to all non-enemy aliens detained within the realm. Such treatment is consonant with a central precept of English justice, that the sovereign's writs run throughout the realm and apply to all persons physically present therein. Thus, all aliens within the realm were treated as entitled to its benefits, and subject to its burdens. This is clearly demonstrated by the slave cases discussed above (*Somerset v. Stewart*, *R. v. Stapylton*, p. 7, *supra*). *See also Case of The Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (entertaining a *habeas* petition of a "female native of South Africa" allegedly held in private custody); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing, but denying, the *habeas* petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer).

In *Calvin's Case,* 77 Eng. Rep. 377 (1608) (a seminal case dealing with issues of citizenship and alienage -- though not a *habeas* case) Chief Justice Coke explained why aliens are equally subject to the prerogative writs, and equally entitled to their benefits. "[W]hen an alien . . . cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as has been said) draweth

the other." *Id.* at 383.[9]

The common law of England therefore affords no support to any suggestion that the scope of the Great Writ is in any way conditioned by the nationality of the detainee. Providing the critical element of physical presence was established, *habeas corpus* could be sought on behalf of (and, indeed, against) any person, regardless of citizenship.

B. The Eighteenth and Early Nineteenth Century History of *Habeas Corpus* Legislation in England Reflects a General Understanding That Civil *Habeas* Was Available to Review Executive Detention at Common Law

As shown above, *habeas corpus* was developed by fifteenth and sixteenth century common law courts as a remedy against unlawful detention. Although a common law creation, constitutional crises led to its reaffirmation in the Petition of Right and the *Habeas Corpus* Act of 1640.[10] Subsequent legislation built on these foundations with largely procedural reforms.

1. *The* Habeas Corpus *Act of 1679*

By 1679, the principle that the writ was available at common law and under the 1640 Act to challenge the legality of detention in a wide range of contexts, civil and criminal, was well established. But problems and controversies had arisen, particularly in criminal cases, regarding the appropriate procedures to be used and which specific courts had power to grant the writ. Unlike its predecessors, the 1679 Act did not codify general principles of *habeas* practice, but instead addressed specific practical issues pertaining to the availability of the writ in cases of

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9 That *habeas corpus* had not been specifically used to review immigration matters as of 1789 reflects the fact that England did not by statute limit admission of aliens until 1793.

10 For the full early history, *see* the sources cited at n.3, *supra*.

criminal confinement (*e.g.*, the availability of the writ during court "vacation" time).

2. *The* Habeas Corpus *Bill of 1758*[11]

In 1758, a bill was proposed to extend the procedural reforms of the 1679 Act to non-criminal cases. It passed the House of Commons but eventually failed in the face of opposition in the House of Lords. But two premises emerge clearly from the debate surrounding the bill. *First*, it was not seriously questioned that *habeas corpus* was already, as a matter of common law, generally available in cases of civil detention. *Second*, there was general agreement that, at least with respect to executive detention, the scope of review on *habeas corpus* in civil cases already was and clearly should remain at least as extensive as in criminal cases, including review of questions of law. The central issues in controversy in 1758 were whether, given the broad scope of civil *habeas* at common law, reforms were necessary in the civil context, whether the specific reforms proposed would render *habeas* too readily available in cases of *private* detention, and whether procedural steps were needed to ensure the availability of *habeas* during times when the common law courts were not sitting, *i.e.*, during "vacation time" instead of "term time."[12].

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11 *See generally*, Barbara W. Kern, *The English High Judiciary & the Politics of the Habeas Corpus Bill of 1758*, *in* HENDRIK HARTOG, WILLIAM E. NELSON, & BARBARA W. KERN, (eds.) LAW AS CULTURE & CULTURE AS LAW 147 (2000). *Amici* are grateful to Ms. Kern for extending to us her research materials.

12 The central common law courts sat only four times a year for about two to three weeks at a time. The dates for the terms varied from year to year according to the calculation of religious holidays, *see generally* C.R. CHENEY (ed.), HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY (1978), but customarily the year began in November with Michaelmas Term (after the "long vacation"), followed by Hilary (January/February), Easter (April/May) and Trinity (June/July).

The bill captured public attention, as shown by "An Account of the Origin and Use of the Writ of HABEAS CORPUS, and of the Bill now in Parliament concerning it," printed in several London newspapers in late May 1758 (*e.g. Lloyd's Evening Post, The London Chronicle, Payne's Universal Chronicle*), when the bill had passed the Commons and was before the House of Lords. The bill was reportedly prompted by a recent impressment act, specifically by reported abuses of impressment officers in disregarding statutory exemptions. The absurdity of saying that *habeas corpus* was available to those accused of crime but not available to those unsuspected of any crime was remarked in the newspapers, but was said to be a "doubt . . . raised by some Lawyer." Yet there was, in fact, no serious question that the *Habeas Corpus* Act of 1679 did not apply to men confined under impressment acts (who had been accused of no crime), but rather that their remedy lay with the writ of *habeas corpus* at common law.

The purpose of the 1758 bill was, thus, not to secure the availability of *habeas* in civil cases; civil *habeas* had long been firmly established. Rather, the bill had been put forward by Charles Pratt, M.P., later Lord Chancellor Camden, in response to the plight of an unnamed gentleman who had been improperly impressed (since, as a gentleman/property holder, he was exempt by statute from impressment), but for whom, for *procedural* reasons, *habeas corpus* had not been effective. As detailed above, *habeas* petitions were available to challenge the impressment of persons who were statutorily exempt (*supra*, p. 5), but *habeas procedures* in civil cases were at times insufficiently expeditious to prevent a falsely impressed man languishing in prison for some time pending judicial action, or, in some cases, from being enlisted and transported from the jurisdiction before the writ became returnable.[13]

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13 These procedural difficulties were discussed in the newspapers of the day. *See, e.g.*, LONDON CHRONICLE, March 18-21, 1758; LONDON EVENING POST, April 28 - May 2, 1758.

Pratt's bill swept through the House of Commons with barely a murmur. It was highly popular, and its eventual defeat in the Lords met with indignant public reaction, one commentator calling it a blow to one of the two fundamentals of English liberty (the other fundamental being trial by jury).[14] The opposition in the Lords was led by Lords Mansfield (recently-appointed Chief Justice of the Court of King's Bench) and Hardwicke (recently resigned as Lord Chancellor after nearly twenty years in that office). In their deliberations, the Lords resolved to put ten questions to the twelve common law judges in order to better understand the need for, and the implications of, the bill. Answers given by nine of the twelve judges are printed in *Parliamentary History*; the views of the other three, including Mansfield, can be reconstructed from other sources.[15] It is not necessary here to recount all of the difficulties that Mansfield, Hardwicke and others had with the bill, except to note one concern--that the bill would make it *harder* to obtain the writ in some civil matters, particularly family disputes, than had been true in practice.[16]

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14 *See, e.g.*, THE MONITOR OR BRITISH FREEHOLDER, July 1, 1758 ("Every friend of liberty must shudder"; "usurpation upon the rights and liberty of the people"; "without [the bill] the personal liberty of the subject may be left to the discretion of a passionate, corrupt, or indiscreet judge").

15 Sir Michael Foster and Thomas Parker (Chief Baron of the Court of Exchequer) corresponded with Chief Justice Wilmot of the Common Pleas, as reproduced in M. DODSON, THE LIFE OF SIR MICHAEL FOSTER, KNT. (1811). Mansfield's answers were never printed, but his notes on the questions and about the bill generally are among surviving manuscripts at the family home in Perthshire, Scone Palace.

16 This would have been due to, among other things, the requirement in the bill that *actual confinement* be alleged, which could not be done in the case of a wife or child who had willingly gone off to live with another person. Hardwicke's unpublished views can be found at Add. MSS 35,878, f. 91 et seq. Mansfield's unpublished notes are at Scone Palace MSS, Bundle 1352.

3. *The* Habeas Corpus *Act of 1816*

At the end of the debate in the House of Lords in 1758, Hardwicke moved that the judges should prepare a bill "to extend the power of granting writs of *Habeas Corpus*" to cases not within the 1679 Act, and to present the bill at the start of the next session of Parliament.[17] This was agreed, and according to Horace Walpole, the maneuver prevented a division in the Lords.[18] The bill was in fact drafted, but was never introduced.[19]

In 1816, however, an act was passed (56 Geo. III, c. 100) that was virtually identical to the judges' bill. The 1816 Act applied to non-criminal situations other than imprisonment for debt or by process in a civil suit, and provided, among other things, that the writ could issue during vacation on a probable cause showing by affidavit, and that the truth of the facts alleged in the return could be examined by a single judge in vacation or by the court in term time.

II.
IN COLONIAL AND EARLY POST-COLONIAL AMERICAN LAW, *HABEAS CORPUS* WAS GENERALLY AVAILABLE TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE NATURE OF THE ILLEGALITY ASSERTED

In colonial and post-colonial America, the lawfulness of

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17 15 PARL. HIST. ENG. 925-25.

18 *Id.* at 925, n.*.

19 The bill is printed in DODSON, *supra*. In a letter of March 9, 1759, Hardwicke reported to Newcastle that he "understood the judges had made a draft," but that, after a little noise about it some time back, he had heard nothing further. He concluded that "it did not look as if the friends of the bill were eager for it." Add. MSS 32,888, f. 436.

Executive Branch confinement was subject to review on petition for writ of *habeas corpus*. In adjudicating *habeas* petitions, state and federal judges performed the core judicial function of interpreting statutes and resolving other questions of law. Judges recognized that the writ was available to contest the legality of civil confinement, and further that it was available regardless of the petitioner's citizenship status. Consistent with the contemporaneous practice in England described above (*supra*, I.A), American judges adjudicated *habeas* challenges to non-criminal confinement by persons in military custody, held as a debtor, bonded servant, or slave, and detained as a deserter from a foreign ship.

As is explained below, the broad scope extended by American courts to *habeas corpus* was affirmed in countless decisions, including opinions by John Marshall, Joseph Story, and Lemuel Shaw. Had Mr. St. Cyr filed a petition for *habeas corpus* in 1789 contending that his Executive Branch custody was pursuant to the government's misinterpretation of a statute, there is substantial evidence that a judge would have decided the merits of the statutory claim.

A. *Habeas Corpus* As Known In England Was Fully A Part of Early American Law

From the establishment of the American colonies, *habeas corpus* was a part of colonial law. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 98 (1980) (conquest of "infidel" (non-Christian) lands such as American colonies resulted in extension of the law of England in force at time of conquest, including common law and all affirming statutory law, insofar as "was applicable to colonial life"); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 156 (1851) (observing that in each colonial charter, "either expressly or by necessary implication it is provided that the laws of England so far as applicable shall be in force there"); HURD, *supra* at 92 ("The American colonists always claimed to possess 'all the rights, liberties, and immunities of free and natural-born subjects within the realm of England'") (citation

omitted). Thus, "the common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776." DUKER, *supra*, at 115. As detailed in Part I, *supra*, that common-law writ was available to review legal challenges to civil custody.[20]

There are few reported *habeas* decisions from the colonial period. This was true because of the paucity of printed case reports, *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102-03, 322-26 (2d ed. 1985), and because "incarceration was not routinely imposed as a means of postconviction punishment for criminal acts until the nineteenth century," Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 11 (1995). The *habeas* decisions that do exist from the colonial era, however, confirm the writ's role as the principal recourse of persons subject to illegal government detention, including non-criminal custody. HURD, *supra*, at 96-97; DUKER, *supra*, at 101-02.

B. In the Post-Colonial Era, *Habeas Corpus* Was As Broad and Effective a Remedy As in England

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20 While the common law right to *habeas corpus* applied with full effect from the establishment of each colony, the *Habeas Corpus* Act of 1679 did not initially extend there, so its procedural innovations were at first unavailable. DUKER, *supra*, at 99 (post-conquest enactments by Parliament applied in colonies only by express direction). Eventually, however, royal governors in Virginia, South Carolina, North Carolina, and Georgia issued proclamations extending the 1679 Act's procedural reforms in those colonies. *See* Dallin H. Oaks, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 251 (1965); *see also* A.H. Carpenter, *Habeas Corpus in the American Colonies*, 8 AM. HIST. REV. 18, 24-25 (1902); DUKER, *supra*, at 100, 103-06. Official extension of the 1679 Act was likely but a formality, for as Zechariah Chafee surmised, "in actual practice all judges used its procedure as a matter of course." Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1952).

Judges widely understood the writ to be available to review the lawfulness of non-criminal confinement in early America, including statutory questions. *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 137 (2d ed. 1893); ("[T]he writ . . . may issue in civil as well as in criminal cases . . . ."); *id.* at 249 ("The issue raised on the hearing of a *habeas corpus* may be one of law simply."); HURD, *supra*, at 146.[21]

Chief Justice John Marshall and Associate Justice Joseph Story, riding circuit, each authored important decisions resolving statutory construction questions on *habeas* petitions challenging civil confinement, Marshall in a debtor case, *see In re Randolph*, 20 F. Cas. 242 (Cir. Ct. D. Va. 1833) (Marshall, C.J., on circuit), Story in a military enlistment case, *see U.S. v. Bainbridge*, 24 F. Cas. 946, 949-52 (Cir. Ct. D. Mass. 1816) (Story, J., on circuit) (interpreting naval enlistment statute), and again in a case involving deserters from a foreign ship, *see Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (construing federal statute governing naval desertion). *See also C'wealth v. Downes*, 41 Mass. (24 Pick.) 227 (Mass. 1836) (Shaw, C.J.) (on *habeas*, construing provision of federal enlistment statute).

1. *The Founders Enshrined* Habeas Corpus *in its Full Width and Effect*

The Articles of Confederation were silent as to *habeas corpus*, Chafee, *supra*, at 145, and "when the constitutional convention met in Philadelphia in 1787 there were [only] four states with *habeas corpus* guarantees in their constitutions." Oaks, *supra*, at 247. *But see* Chafee, *supra*, at 146 (absence of *habeas*

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21 It is also plain that the writ was available to non-citizens. *See, e.g.*, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 989 (1998) ("The right to the writ . . . in the United States was . . . not limited to citizens."); *U.S. v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (on *habeas*, discharging non-citizen arrested for treason).

provisions in state constitutions because writ "had been so long and solidly established in every colony that assertion was probably considered unnecessary").

Yet the authors of the U.S. and state constitutions were careful to preserve the writ of *habeas corpus* and to ensure that early U.S. practice continued English and colonial traditions. At the Constitutional Convention, Charles Pinckney of South Carolina proposed several versions of a guarantee of the writ of *habeas corpus*, and apart from objection by some that the writ should never be suspended, the Suspension Clause was adopted with little debate. HURD, *supra*, at 107-10; Oaks, *supra*, at 248-49 (noting that three colonies voted against the provision that writ may be suspended "when in cases of Rebellion or Invasion the public Safety may require it"); DUKER, *supra*, at 127-35.

Statutory enactments followed the adoption of *habeas corpus* clauses in the federal and state constitutions. Congress provided for *habeas corpus* jurisdiction in section 14 of the Judiciary Act of Sept. 24, 1789, 1 Stat. 73, 81-82 (1789), which codified the familiar common law writ. The common law of each original state also provided for *habeas* review. The states moved slowly to adopt formal statutory provisions, Oaks, *supra*, at 251, and initially all patterned their statutes on the 1679 English Act. *Id.* at 252-53. *See also* HURD, *supra*, at 121-28. Like the 1679 Act, the statutes in five states initially neglected non-criminal confinement, leaving civil custody subject to challenge under the traditional common law writ. Oaks, *supra.* at 254-55.

2. *Post-Colonial Case Law Evidences The Wide and General Application of* Habeas Corpus *To Review Questions of Law*

Reflecting eighteenth century English practice, the writ of *habeas corpus* was invoked to challenge the lawfulness of non-criminal confinement in a number of circumstances in the post-colonial period. In their decisions, state and federal judges regularly performed the traditional function of construing statutes and resolving other questions of law.

a. Habeas *as a Remedy for Indentured Servants*

Habeas was used to challenge private confinement as an indentured servant, and in these cases judges regularly adjudicated statutory claims. *See, e.g.*, *Respublica v. Keppele*, 2 U.S. 197, 198-99 (Mem.) (Pa. 1793) (construing Pennsylvania servant statute, concluding infant could not be bound, and discharging fourteen year-old who had fled service); *State v. Sheve*, 1 N.J.L. (1 Coxe) 230, 230 (N.J. 1794) (granting writ to 27-year old man indentured by mother, upon application of common-law principle that "parental authority to dispose of a child's services ceases when the latter arrives at the age of twenty-one"); *State v. Taylor*, 3 N.J.L. (2 Penning.) 467, 1808 WL 1006, at *1 (N.J. 1808) (Pennington, J., dissenting) (minor must agree to indenture himself under "the true construction" of state servitude statute); *C'wealth ex rel. Stephenson v. Vanlear*, 1 Serg. & Rawle 248, 1815 WL 1221, at *2-3 (Pa. 1814) (opinion of Tilghman, C.J.) (construing 1799 statute, partly in contrast to 1790 act, and holding master's assignment of indentured minor to third-party, without consent of minor's father, improper under later statute); *In re Goodenough*, 19 Wis. 274 (1865) (holding indenture in violation of state statute requiring that instrument specify instruction in "profession, trade, or employment"). Church specifically notes that where states regulate such relationships, "[i]ndentures of apprenticeship must conform to the requirements of the statute," CHURCH, *supra*, at 744, and are subject to *habeas* review. *Id.* at 745.

Judges also adjudicated a related legal claim on *habeas*, that a master had unlawfully removed a servant from the state in which the indenture had been executed. *See, e.g.*, *C'wealth v. Edwards*, 6 Binn. 202 (Pa. 1813) (applying common law to hold minor bound in Virginia may not be removed to Pennsylvania, where indenture does not provide for such removal). *See also Davis v. Coburn*, 8 Mass. 299, 1811 WL 1678, at *4 (Mass. 1811) (if master could assign servant from New Hampshire "into *Massachusetts*, I see not why he might not have sent him to *Georgia*, or even to *China*. That a master should have such legal authority would be monstrous") (emphasis in original); *Gusty v.*

Diggs, 11 F. Cas. 128 (Cr. Ct. D.C. 1820) (apprentice bound in Maryland may not be brought into District of Columbia).

b. Habeas *As Applied in Civil Debtor Cases*

Debtors subject to confinement also petitioned for writs of *habeas corpus* in the United States, and these petitions frequently raised questions of law.[22] The opinions in *In re Randolph*, 20 F.

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22 *See, e.g.*, *Kennedy & Co. v. Fairman*, 2 N.C. (1 Hayw.) 408 (N.C. 1796) (construing creditor notice provision of insolvency statute and remanding prisoner); *Fitzpatrick v. Neal*, 3 N.C. (2 Hayw.) 8 (N.C. 1797) (debtor arrested and imprisoned pursuant to letter of attorney released because letter not under required seal); *Shorthouse & Ross v. Carothers*, 3 Yeates 182 (Pa. 1801) (releasing debtor who had been re-arrested after posting bond in same cause); *Ex Parte McNeil*, 6 Mass. 245 (Mass. 1810) (discharging debtor as privileged from arrest while attending court in the "necessary care of his action"); *C'wealth v. Cornman*, 4 Binn. 483 (Pa. 1812) (construing provisional discharge section of 1812 insolvency statute and remanding prisoner); *C'wealth v. Alexander*, 6 Binn. 176 (Pa. 1813) (on *habeas*, releasing debtor on grounds that warrant was defective); *Attorney Gen. v. Fenton*, 19 Va. (5 Munf.) 292 (Va. 1816) (affirming discharge of men confined by court-martial, for failure to pay fine for not appearing at place of rendezvous for militia); *C'wealth v. Keeper of Jail*, 4 Serg. & Rawle 505 (Pa. 1818) (construing 1802 federal statute prohibiting arrest of soldier for debt and denying writ to detained husband who deserted family and failed to provide maintenance); *Bank of U.S. v. Jenkins*, 18 Johns. 305, 309 (N.Y. Sup. Ct. 1820) (affirming authority under state *habeas* statute to review lawfulness of debtor's imprisonment); *Richards v. Goodson*, 4 Va. (2 Va. Cas.) 381 (Va. 1823) (holding debtor privileged from arrest while attending court on his own case and discharging prisoner); *C'wealth v. Waite*, 19 Mass. (2 Pick.) 445 (Mass. 1824) (where debtor arrested upon valid execution, incorrect copy produced in return to writ, and correct copy provided later, terms of state statute satisfied). *See also Discharge of Richardson*, Worcester Sup. Jud. Ct., (Mass. Sept. 1800) (discharging debtors who, as soldiers, were exempt from imprisonment for debt under federal

Cas. 242 (Cir. Ct. D. Va. 1833), show that judges resolved questions of statutory construction in *habeas* challenges to civil confinement of debtors. There, on a warrant issued by the Treasury under a statute governing the administration of public accounts, *see* 3 Stat. 592, 31 U.S.C. §§ 506-508, Randolph was arrested for debt allegedly outstanding following his naval service. *Randolph*, 20 F. Cas. at 242. On *habeas*, Chief Justice Marshall recited but avoided several constitutional challenges raised by Randolph's counsel, notably that the act impermissibly conferred judicial power on the executive. *Id.* at 253-54 (Marshall, C.J., on circuit). He then conducted a detailed statutory analysis, comparing the text of §§ 2 and 3 of the act, before construing the sections narrowly as not applying to Randolph, an "acting" Purser. *Id.* at 254-57; *see also id.* at 256 (describing "fair construction" of act); *id.* at 251-52 (Barbour, D.J., on circuit) (construing act as not permitting Treasury to reopen account previously settled).[23]

c. Habeas *To Redress Unlawful Military Enlistment*

Nineteenth century American courts decided many *habeas* petitions challenging the legality of military and naval enlistments, routinely exercising a broad scope of review. NELSON, *supra*, at 457 ("State writs of *habeas corpus* . . . were used on numerous occasions to test the validity of military enlistments . . . Such state writs, of course, carried with them the power to interpret the federal statutes by which the validity of the enlistments was determined"). *See generally* HURD, *supra*, at 156.

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statute), cited in William E. Nelson, *The American Revolution and the Emergence of the Modern Doctrine of Federalism and Conflict of Laws*, 62 COLONIAL SOC. OF MASS. 419, 458 n.7 (1984); Oaks, *supra*, at 265.

23 Judge Barbour also considered "whether *habeas corpus* could be sustained in favor of a party imprisoned under civil process," *id.* at 253, in light of Marshall's cryptic decision in *Ex Parte Watson*, 10 U.S. (6 Cranch) 52 (1810). Barbour reviewed the common law authorities, however, and concluded that "the writ is not confined to criminal cases." *Randolph*, 20 F. Cas at 253.

Many *habeas* challenges to military enlistments arose around the time of the War of 1812. In an effort to expand the nation's military forces, the federal government paid bounties to enlistment brokers for each new recruit secured, leading to a high number of fraudulent enlistments, often of minors. Arkin, *supra,* at 14-15. *See, e.g., C'wealth v. Murray*, 4 Binn. 487, 487, 492-93 (Pa. 1812) (opinion of Tilghman, C.J.) (interpreting 1809 statute as permitting naval enlistment of minor child who "has neither father, master, nor guardian" and "against the consent" of mother, relying in part on comparison between 1802 army and 1809 naval enlistment statutes); *Ex parte Mason*, 5 N.C. (1 Mur.) 336, 337 (N.C. 1809) (construing statutory term "parent" as including mothers as well as fathers); *C'wealth v. Cushing*, 11 Mass. (11 Tyng) 67, 71 (Mass. 1814) ("The *true construction* must be, that persons under the age of twenty-one years are not to be enlisted or held in service, unless with the [required] consent . . . and if they have no parents, guardians, or masters, they are not to be enlisted or held in service at all") (emphasis added); *C'wealth ex rel. Menges v. Camac*, 1 Serg. & Rawle 87, 1814 WL 1344, at *2 (Pa. 1814) (opinion of Tilghman, C.J.) (construing statute as permitting father to consent days after minor's formal enlistment).[24]

The differing interpretations of the parental consent provisions reached by the Pennsylvania and Massachusetts courts were addressed in a major opinion by Justice Story on circuit. *United States v. Bainbridge*, 24 F. Cas. 946 (Cir. Ct. D. Mass. 1816), exemplified statutory construction in a *habeas corpus* case. *Bainbridge* was a challenge to a minor's enlistment in the U.S. Navy without parental consent. After concluding that Congress could constitutionally authorize the enlistment of a minor without parental consent, Justice Story turned to the specific question of whether Congress actually had so legislated. Reviewing the language of the naval and army enlistment acts, and reading the instant statute against general common-law contract principles,

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24 *See also In re Stacy*, 10 Johns 328, 333-34 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (discharging civilian accused of treason and detained by federal military authorities as beyond authority of tribunal).

Justice Story concluded that the naval acts allowed the enlistment of a minor without his father's consent. *Id.* at 951-52.[25]

Habeas review of legal questions in the enlistment cases was plainly available to non-citizens. *See, e.g., C'wealth v.*

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25 *Habeas* challenges to military enlistments led judges to continue to construe the statutes after the War of 1812. *See, e.g., State v. Brearly*, 5 N.J.L. 555, 1819 WL 1256, at *5 (N.J. Sup. Ct. 1819) (consent by master subsequent to enlistment of apprenticed minor sufficient under statute); *State v. Clark*, 2 Del. Cas. 578, 580-81 (Del. Ch. 1820) (discharging soldier on evidence that he was underage and intoxicated at time of enlistment, "knew nothing of being enlisted until the next morning," and lacked his father's consent, as confinement was "contrary to law"); *In re Carlton*, 7 Cow. 471, 471, (N.Y. Sup. Ct.1827) ("Any person illegally detained, has the right to be discharged, and it is the duty of this court to restore him to his liberty."); *C'wealth v. Downes*, 41 Mass. (24 Pick.) 227, 1836 WL 2527, **3-4 (Mass. 1836) (Shaw, C.J.) (distinguishing *Bainbridge* and holding statute does not authorize minor enlisting as seaman in the U.S. Navy without consent of his legal guardian); *Bamfield v. Abbot*, 2 F. Cas. 577, 578 (D. Mass. 1847) (discharging minor allegedly enlisted under 1846 act, where company had "not [yet] been mustered into the service of the United States, or been received or accepted by any officer thereof"); *C'wealth ex rel. Webster v. Fox*, 7 Pa. 336, 1847 WL 5030, at *2 (Pa. 1847) (prohibition in the 1802 Act against enlistment of minors without consent of father, guardian, or master "is as plain as the English language can make it"); *Sim's Case*, 61 Mass. (7 Cush.) 285, 309 (1851) (issuance of writs "is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void"); *U.S. ex rel. Turner v. Wright*, 28 F. Cas. 798, 798-99 (Cir. Ct. W.D. Pa. 1862) (construing statute as requiring discharge of minor who enlisted on false oath); *U.S. v. Taylor*, 28 F. Cas. 22, 22-23 (D.N.J. 1863) (statutory language and legislative history indicate that oath of enlistment taken by the recruit is conclusive as to his age); *In re McDonald*, 16 F. Cas. 33, 34-36 (D. Mass. 1866) (engaging in "[a] careful examination of the acts of congress regulating enlistments in the army" to determine whether, *inter alia*, enlistment of minor without father's consent was valid).

Harrison, 11 Mass. 63, 65 (Mass. 1814) (discharging Russian minor enlisted without consent of parent, guardian, or master, as "[a] foreign minor is included in the [statutory] prohibition"); *Wilson v. Izard*, 30 F. Cas. 131, 1815 U.S. App. Lexis 247, at *2 (C.C. D. N.Y. 1815) (adjudicating claim by British enlistees that they were "alien enemies" ineligible to serve but remanding); *U.S. v. Wyngall*, 5 Hill 16, 18, 26, 1843 WL 4481, at *7 (N.Y. Sup. Ct. 1843) (construing statutory authorization to enlist "able bodied citizen[s] of the United States" as directory, not mandatory and concluding that non-citizen was lawfully enlisted).

d. Habeas *Relief For Deserters From Foreign Ships*

Seamen who deserted from foreign ships, regardless of citizenship, were subject to arrest, either at the request of consular officers pursuant to treaty or under general federal legislation enacted in 1829. *See* Neuman, *supra*, at 990-91. These arrests occasionally prompted *habeas* petitions to state and federal judges, whose decisions resolved questions of law. *See, e.g., C'wealth v. Holloway*, 1 Serg. & Rawle 392 (Pa. 1815) (discharging alleged deserter and holding arrest not authorized by statute or common law); *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L.J. 132 (reporting 1809 Maryland decision discharging alleged deserters); *Case of Hippolyte Dumas*, 2 Am. L.J. 86 (reporting 1807 Pennsylvania decision discharging alleged deserters); *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (1821) (arrest of deserters by justice of peace exceeded his authority); *In re Pederson*, 19 F. Cas. 91 (S.D.N.Y. 1851) (construing treaty as inapplicable to Swedish deserter who returned home and was later arrested after emigrating to U.S.); *see also U.S. v. Lawrence*, 3 U.S. (3 Dall.) 42, 49 (Mem) (1795) (where district court declined request of French consul to arrest alleged deserter, Attorney General sought mandamus from Supreme Court, arguing if arrest was unlawful prisoner could seek release on *habeas corpus*);*U.S. v. Desfontes & Gaillard* (S.D. Ga. 1830) (on *habeas* petition by French Consul to deliver alleged French deserters, holding sailors properly detained on state criminal charges and remanding to state custody), reprinted in Eric M. Freedman, *Milestones in Habeas*

Corpus: Part I, 57 ALA. L. REV. 531, 598-99 (2000).

In 1813, Portugese sailors arrested as alleged deserters petitioned for a writ of *habeas corpus* in federal court, requiring Justice Story, on circuit, to interpret provisions of a federal statute. *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (construing Act of July 20, 1790, 1 Stat. 131, regulating seamen in merchant service). The court, per Story, was "of the opinion, that the act for the regulation of seamen exclusively applies to seamen engaged in the merchants' service of the United States." *Id.* at 854. Because the Portugese sailors were engaged by a foreign vessel, Story held their confinement was authorized by neither statute nor treaty. *Id.*

e. Habeas *as a Remedy Against Other Forms of Civil Confinement*

Legal questions arose on *habeas* challenges to non-criminal confinement in several other circumstances. A number of decisions addressed challenges to confinement by a justice of the peace or lower court, often resulting in delineation of the scope of the confining entity's legal authority. *See, e.g.*, *C'wealth v. Ward*, 4 Mass. (Tyng) 497, 497 (1808) ("[t]he justice [of the peace] has wholly misconceived his authority" and "the commitment was illegal"); *C'wealth v. Morey*, 8 Mass. (Tyng) 78 (Mass. 1811) (same); *Hite v. Fitz-Randolph*, 3 Va. (1 Va. Cas.) 269 (1812) (on *habeas*, discharging creditor who had been arrested on contempt order for trying to collect on judgment subject to stay, on grounds that "county court [had] no right to make an order restraining [creditor] from proceeding on his judgment at law obtained in the superior court of law"); *C'wealth ex rel. Kerr v. Brady*, 3 Serg. & Rawle 309 (Pa. 1817) (on *habeas*, holding probate court lacked authority to confine relator on contempt and discharging prisoner); *Washburn v. Belknap*, 3 Conn. 502 (1821) (confinement to workhouse for indefinite term by justice of peace contrary to statute); *State v. Applegate*, 13 S.C.L. (McCord) 110 (1822) (justice of peace not authorized to confine constable for act of contempt done outside presence of justice); *Ex parte Minor*, 17 F.

Cas. 457 (Cir. Ct. D.C. 1823) (on *habeas*, discharging debtor as arrest warrant exceeded authority of justice of peace). *See also McMullen v. Charleston*, 1 S.C.L. (Bay) 46 (S.C. 1787) (arrest for selling certain liquor by municipal "court of wardens" unauthorized by statute permitting municipality to regulate liquor).

In some instances, slaves sought writs of *habeas corpus* to win their freedom. *See, gen.* Arkin, *supra*, at 33-41; *see also Respublica v. Betsey*, 1 U.S. 469 (Mem.) (Pa. 1789) (construing Pennsylvania statute governing abolition of slavery as requiring discharge where owner failed to register slave by statutory deadline); *State v. Emmons*, 2 N.J.L. 6 (1806) (applying 1798 state statute governing freeing of slaves and holding execution of manumission did not satisfy statutory requirements); *State v. Quick*, 2 N.J.L. 393 (1807) (applying New York statute and granting slave's petition for freedom); *C'wealth ex rel. Lewis v. Holloway*, 6 Binn. 213 (Pa. 1814) (construing exception for slaves of members of Congress to state statute governing abolition of slavery and remanding); *Elkison v. Deliesseline*, 8 F. Cas. 493, 496 (Cir. Ct. D. S.C. 1823) (Johnson, J. on circuit) (declaring local Negro Seaman Act unconstitutional, but holding federal *habeas* statute did not reach person in state custody).

Finally, as in England, persons confined in mental health institutions occasionally petitioned for release on *habeas*. *See Oakes*, 8 Monthly Law Reporter 122 (Sup. Jud. Ct. Mass. 1845) (not officially reported), excerpted in Oaks, *supra*, at 267.

In short, the history of colonial and early post-colonial *habeas* practice demonstrates a strong continuity with English traditions set forth in Part I, *supra*. At common law and pursuant to state and federal statutory enactments, the writ was plainly available to persons held in non-criminal confinement as a means to challenge the lawfulness of their custody. The writ was available to non-citizens. And, most importantly for the instant case, the rich history of early civil *habeas* practice confirms that state and federal judges regularly decided questions of law, including interpretation of statutes governing military enlistment, confinement of debtors, indentured servitude, abolition of slavery

and desertion from foreign ships. These decisions provide significant support for the proposition that statutory claims, such as the statutory retroactivity claim asserted by Respondent Enrico St. Cyr, were subject to review on the writ of *habeas corpus* familiar to the Founders.

CONCLUSION

For the foregoing reasons, amici ask this Court to grant relief to the Respondent Enrico St. Cyr.

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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ASSOCIATION OF FEDERAL DEFENDERS, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, COMMITTEE FOR PUBLIC COUNSEL SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, COOK COUNTY PUBLIC DEFENDER'S OFFICE, DIVISION OF PUBLIC DEFENDER SERVICES OF THE STATE OF CONNECTICUT, FLORIDA PUBLIC DEFENDER ASSOCIATION, LOS ANGELES COUNTY PUBLIC DEFENDER, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE DEFENDERS ASSOCIATION, PUBLIC DEFENDER OF FLORIDA'S ELEVENTH JUDICIAL CIRCUIT, TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, WASHINGTON DEFENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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63pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. LAWFUL PERMANENT RESIDENT IMMIGRANTS RELIED ON THE RIGHT TO SEEK RELIEF FROM DEPORTATION WHEN PLEADING GUILTY PRIOR TO THE 1996 AMENDMENTS 4

A. Lawful Permanent Resident Immigrants Convicted Prior To The 1996 Amendments Had A Statutory Right To Seek Relief From Deportation 5

B. Pre-1996 Practice Aids Informed Defense Lawyers Regarding the Immigration Implications of Conviction Including the Right of Long-Term Lawful Permanent Resident Immigrants to Seek Relief from Deportation 6

C. Training Programs Further Alerted Defense Lawyers to the Immigration Implications of Conviction and to Relief from Deportation 8

D. In-House or Outside Experts Also Advised Defense Lawyers Regarding the Immigration Implications of Conviction and Relief from Deportation 10

TABLE OF CONTENTS – Continued

Page

E. Lawful Resident Immigrants Pled Guilty in Reasonable Reliance on the Advice of their Lawyers and Others that They Had a Right to Seek Relief from Deportation..... 11

II. THE COURT BELOW CORRECTLY FOUND THAT THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO PRE-AMENDMENT GUILTY PLEAS IS IMPERMISSIBLY RETROACTIVE 21

III. IN ANY EVENT, THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO THE UNDERLYING ORIGINAL CONDUCT IS IMPERMISSIBLY RETROACTIVE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are associations of public and private criminal defense lawyers who have represented or counseled thousands of lawful permanent resident immigrants accused of crimes over the years. Before the 1996 amendments to the nation's deportation laws, many of our lawful resident immigrant clients gave up their right to a trial and agreed to plead guilty. They did so with the expectation that conviction would not result in deportation, or at least not mandatory deportation. This understanding arose because, under pre-amendment law, even if they were subjected to deportation proceedings, they had a statutory right to seek a waiver of deportation so long as they had lawfully resided in the United States for at least seven years. Nevertheless, after Congress amended the deportation laws to place new criminal bars on the right of long-term lawful permanent residents to apply for relief from deportation, the government has sought to apply these amendments to pre-amendment conduct and convictions even though Congress did not direct such retroactive application. *Amici* have a strong interest in protecting our lawful resident immigrant clients from unfair disruption of the reasonable expectations they formed when pleading guilty or making other choices during their criminal proceedings based on our legal advice. Thus, to inform the Court's review of the decision below, *amici* offer this brief, which is based on our collective experience in the representation and counseling of lawful resident immigrants in criminal proceedings.[2]

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[1] This *amici curiae* brief is filed with the written consent of all parties. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission.

[2] The separate statements of interest of each of the *amici* criminal defense organizations are included in Appendix A.

SUMMARY OF ARGUMENT

This brief addresses the government's contention on the merits that application of 1996 amendments mandating deportation for certain offenses to the respondent – whose deportable conduct and plea of guilt to that conduct preceded these amendments – does not violate the presumption against retroactivity of new laws. As a preliminary matter, *amici* agree with the respondent and the court below that the 1996 amendments – Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, § 304(b), 110 Stat. 3009 (1996) – do not include any clear and unambiguous statement of retroactive congressional intent. In the absence of any such clear statement, the presumption against retroactivity precludes the government from applying the 1996 amendments to any individual whose deportable conduct predated the effective date of the amendments. (*See* Point III). However, as the Second Circuit's holding was limited to those individuals, like the respondent, who pled guilty prior to the amendments, *amici* will focus first and foremost on that more narrow holding. (*See* Points I and II).

Much is at stake when lawful permanent resident immigrants are accused of a crime that could render them deportable. Lawful resident immigrants possess a status that confers authorization to reside in this country, to work without restriction, and to travel abroad and lawfully return to the United States. However, a lawful resident immigrant who was convicted prior to the 1996 deportation law amendments had a statutory right to apply for relief from deportation *before* his or her lawful resident status could be extinguished in any subsequent deportation proceedings. Lawyers representing lawful resident immigrants in criminal proceedings were aware of this through defense practice aids, training, and expert consultations. Thus, criminal defense lawyers – as well as other lawyers, community advocates, and immigrant neighbors, friends, and family – advised lawful resident immigrants that conviction would

not necessarily result in deportation. Lawful resident immigrants pled guilty or made other choices in their criminal proceedings in reliance on this advice. (*See* Point I).

In order to maintain confidence in the integrity and fairness of the plea bargaining process, the reasonable reliance of lawful resident immigrants on the law in effect at the time of a guilty plea should be protected from undue interference. At present, over 90 percent of criminal convictions are obtained by guilty plea. Clearly, the criminal justice system relies heavily on the willingness of criminally accused persons to give up their right to a jury trial and other constitutional rights by agreeing to plead guilty. However, the government's disruption of the settled expectations and reasonable reliance of lawful resident immigrants who pled guilty prior to the 1996 amendments unduly and unlawfully interferes with the plea bargaining process. This is because taking away a lawful resident immigrant's right to apply for relief from deportation changes the legal consequence of his or her pre-amendment conduct and plea. Whereas, at the time of the plea, deportation had been only a possibility, the government's position now makes deportation certain in many cases. Thus, the court below correctly found that the government's application of the new laws to a pre-amendment guilty plea has retroactive effect and violates the presumption against retroactivity of new statutes. (*See* Point II).

In any event, the law recognizes that people have a right to know the possible legal consequences of their actions at the time of their original conduct, whether or not they will be able to demonstrate subsequent conduct, such as a guilty plea, in reliance on that knowledge. Thus, the Court's decisions – in both the civil and criminal contexts – have rightly found that it is the law on the date of the original conduct at issue that is the crucial benchmark for determining impermissible retroactive effect of application of a new law regardless of whether there is later conduct demonstrating reliance on prior law. Therefore, the government's application of the 1996 amendments to the original conduct here is itself impermissibly retroactive. (*See* Point III).

ARGUMENT

I. LAWFUL PERMANENT RESIDENT IMMIGRANTS RELIED ON THE RIGHT TO SEEK RELIEF FROM DEPORTATION WHEN PLEADING GUILTY PRIOR TO THE 1996 AMENDMENTS

In criminal proceedings, the accused faces a number of choices on how to proceed. He or she may (1) plead guilty as charged; (2) plead guilty to a lesser offense in satisfaction of more serious charges; or (3) contest the charges and proceed to trial. If the accused agrees to forego his or her right to a trial and plead guilty, he or she may choose among different disposition options after considering the penal sanctions and other consequences of each option. If the case progresses to trial, different choices may present themselves, such as whether to make pre-trial motions or raise defenses with respect to certain charges, and not to others. And once there is a disposition of guilt by plea or verdict, the accused may choose to appeal or refrain from doing so.

These choices are faced by the innocent as well as the guilty. Though innocent, an individual accused of a crime who is held without bail may choose to plead guilty to a lesser charge in order to get out of jail with a sentence of "time served" only, or in order to avoid the threat of a longer prison sentence after trial on a more serious charge. *See North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (holding that a guilty plea is not inconsistent with a claim of innocence because "reasons other than the fact that he is guilty may induce a defendant to so plead").

In weighing his or her choices during a criminal case, a lawful permanent resident immigrant defendant faces the additional risk of deportation from the United States and loss of his or her highly valued status. A lawful resident immigrant – holder of the much-sought-after "green card" – has been admitted to the United States with legal authorization to reside permanently in this country, to work without restriction, and to travel abroad knowing that he or she may lawfully return. As a result, the risk of deportation is a

central concern of any plea negotiations involving such a client.

A. Lawful Permanent Resident Immigrants Convicted Prior To The 1996 Amendments Had A Statutory Right To Seek Relief From Deportation

Lawful permanent resident immigrants who pled guilty to a crime that subjected them to possible deportation have long had a right to seek a waiver of exclusion or deportation from an immigration judge under Section 212(c) of the Immigration and Nationality Act (INA), provided they had been lawfully domiciled in the United States for seven years at the time of their deportation hearing. *See* Immigration and Nationality Act of 1952, § 212(c), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1182(c) (1994)); *see also Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) (adopting and applying *Francis* holding nationwide). Under pre-amendment law, 212(c) relief was barred only if the lawful resident immigrant had been convicted of an "aggravated felony or felonies" and had served five years or more in prison for the crime(s). *See* 8 U.S.C. § 1182(c) (1994).

Even if an immigration judge found that a lawful permanent resident had been convicted of a deportable offense, the judge was required by law to adjudicate an application for 212(c) relief before deportation could be ordered. *See* 8 C.F.R. § 212.3(e) (2000). In addition, the immigration judge's discretion on whether to grant 212(c) relief was governed by standards established by the Board of Immigration Appeals, and the judge's decision was subject to review by the Board. *See, e.g., Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978) (setting forth adjudicatory standard weighing positive factors, such as family ties and long residence, against seriousness of criminal record). In fact, in the years prior to the 1996 amendments, about half of applications for 212(c) relief were granted. *See Tasios v. Reno*, 204 F.3d 544, 551 (4th Cir. 2000) (citing *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y. 1997)).

Therefore, under pre-amendment law and practice, a long-time lawful resident immigrant accused of a crime could be assured that, even if he or she pled guilty or was otherwise convicted in the criminal proceedings, he or she would be able to seek a waiver of deportation in any subsequent deportation proceedings. Additionally, the lawful resident immigrant could be reasonably advised that he or she would have a good chance of being granted the waiver, especially if he or she had long resided in the United States or had significant family and other ties to the country.

B. Pre-1996 Practice Aids Informed Defense Lawyers Regarding the Immigration Implications of Conviction Including the Right of Long-Term Lawful Permanent Resident Immigrants to Seek Relief from Deportation

Prior to the 1996 deportation law amendments, there were numerous immigration law practice aids designed specifically to assist criminal defense lawyers in analyzing the immigration consequences of criminal convictions for noncitizen defendants. These practice aids invariably included information about the important right of lawful permanent resident immigrants to seek a 212(c) waiver of deportation. For example, *Immigration Law and Crimes*, considered the national "Bible" for determining immigration law implications of criminal cases, informed defense lawyers that the 212(c) waiver is "extremely beneficial" and emphasized its importance as an ameliorative mechanism for those charged with crimes that could trigger immigration consequences, particularly drug offenses such as the respondent's. Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes*, § 11.4 (West Group 1984-2000). Other practice aids also advised defense lawyers about the wide availability of 212(c) relief. *See* Maryellen Fullerton and Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425, 440 (1986) (instructing defense attorneys that the "only crime for which this [212(c)] waiver is unavailable is a conviction for possession of a shotgun or automatic

weapon"); Katherine A. Brady and David S. Schwartz, *Public Defenders Handbook on Immigration Law* (California Public Defenders Association, 1988) (instructing defense attorneys that "[t]he eligibility of [lawful permanent residents] to apply for a [212(c)] waiver of deportation or exclusion will survive a conviction for any crime, except possession of a sawed-off shotgun or automatic or semi-automatic weapon") (see lodged document L-16); Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30-Jun Ariz. Att'y 15, 31 (1994) (instructing defense attorneys that a 212(c) waiver "is probably the most common form of relief available, and also certainly the easiest to obtain").

The information about the importance of 212(c) relief provided to criminal defense lawyers by these practice aids is well summarized in a defense manual that was used by federal defenders nationwide:

> The most readily available form of relief from deportation/exclusion is the discretionary waiver available under § 212(c) of the Act. This waiver is available to aliens who have accrued at least seven years of uninterrupted legal resident status in the United States . . . . It is crucial that defense counsel determine whether a non-citizen client is eligible for this waiver. . . . The wisest course of action is to consult with an immigration attorney regarding the probability that the client would be eligible for such a waiver, after trying to determine the client's immigration status and criminal history, so that the client will be able to make an informed choice.

Larry Ainbinder, updated by Hilary Hochman, Ch. 17, *Special Considerations in Representing the Non-Citizen Defendant*, in *Defending a Federal Criminal Case* 837, 853 (Federal Defenders of San Diego, 1995 ed.) (see lodged document L-13).

The practice aids conveyed to defense lawyers the sense that, if their lawful resident client was considering a plea but was worried about deportation, the possibility of 212(c) relief could be raised as a means of allaying the client's concerns about a decision to plead guilty. For example, one practice

aid advised: "[T]he attorney should consider the possibility of § 212(c) relief. It should be discussed with the alien client prior to the plea or trial. This may help alleviate the alien's fears." James A. Benzoni, *Defending Aliens in Criminal Cases* (training materials prepared for criminal defense lawyers attending CLE programs in Iowa from 1994-1997) (see lodged document L-15).

The practice aids also emphasized the importance of taking any necessary affirmative steps to preserve eligibility for 212(c) relief. This was the case particularly after enactment of the Immigration Act of 1990, which made persons ineligible for 212(c) relief if they had served five years in prison for an aggravated felony conviction. Immigration Act of 1990, Pub. L. 101-649, § 511(a), 104 Stat. 5052. For example, a 1991 article, which was distributed to all members of *amicus* National Association of Criminal Defense Lawyers (NACDL), counseled: "In entering a plea, a criminal defense attorney should be aware of this serious consequence [ineligibility for 212(c) relief under the Immigration Act of 1990] and take steps, where possible, to avoid it." Ira J. Kurzban, *The Immigration Act of 1990*, The Champion, Apr. 1991, at 5; *see also* Jan J. Bejar, *Representing Aliens in Criminal Proceedings* in Criminal Justice Act Seminar materials, June 4, 1991 ("This is an extremely important waiver . . . negotiating a term of even one day less than five years could make a difference") (see lodged document L-14).

A partial list of the many books, defense manual chapters, articles, and other materials containing similar advisals for defense lawyers throughout the country in the years preceding the 1996 amendments is included in Appendix B.

C. Training Programs Further Alerted Defense Lawyers to the Immigration Implications of Conviction and to Relief from Deportation

Prior to the 1996 amendments, criminal defense lawyers attended trainers on the immigration consequences of criminal convictions, including the availability of relief from deportation. The National Immigration Project conducted or

participated in numerous training presentations throughout the country, including programs specifically addressing 212(c) relief. *See* Appendix C. In addition, Federal Judicial Center training for federal defenders from all over the country has periodically included training on the immigration issues in criminal cases. *See id.* Many other organizations or individual immigration law experts provided similar training that focused on immigration issues relating to a particular state's criminal laws, including eligibility for relief. For example, in California, the state with the largest lawful permanent resident immigrant population, the Immigrant Legal Resource Center (often in Continuing Legal Education seminars co-sponsored by the California Bar Association, Criminal Law Section), as well as individual public defender offices, private expert lawyers, and law school faculty, provided training to defense lawyers about the immigration consequences of criminal convictions. Over thirty of such training seminars were conducted in the 1990s alone. *See* Appendix C; *see also* Declarations of Katherine A. Brady, James F. Smith, and Norton Tooby filed in *In re Resendiz*, No. S078879 (Cal.) (see lodged documents L-5, L-11, L-12). In New York, the state with the second largest lawful resident immigrant population, criminal defense lawyers of *amicus* The Legal Aid Society of the City of New York, the largest provider of criminal defense legal services in the state, have received initial orientation, update training, a staff manual chapter, and training update written materials, about the immigration consequences of criminal convictions. *See* Affidavit of Dennis R. Murphy, filed with *amicus curiae* brief of the NACDL & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 (AG 1998) (see lodged document L- 10). A sampling of the national and state training programs conducted for defense lawyers throughout the country in the years preceding the 1996 amendments is included in Appendix C.

D. In-House or Outside Experts Also Advised Defense Lawyers Regarding the Immigration Implications of Conviction and Relief from Deportation

Defense lawyers also consulted with experts for guidance on the immigration consequences of criminal convictions and the evaluation of specific plea bargain choices in individual criminal cases. On a national level, the National Immigration Project has responded to about 800 inquiries from criminal defense lawyers every year. In addition, immigration law experts in many of the high-immigrant population states have provided assistance on determining the specific interplay between federal immigration law and these states' criminal laws. In California, for example, the Immigrant Legal Resource Center, a nonprofit legal backup center, has conducted telephone consultations for public defenders and private attorneys to answer questions concerning the immigration consequences of choices faced by noncitizen defendants in criminal proceedings. *See* Brady Decl., ¶ 8. Other public defense or legal aid offices have their own in-house experts available for consultation on immigration issues. For example, the immigration law training provided to its staff by the Criminal Defense Division of *amicus* The Legal Aid Society of the City of New York has been supplemented by the presence on staff of attorneys with special expertise in immigration law. *See* Murphy Aff., ¶ 6. In the years prior to the 1996 deportation amendments, these outside or in-house immigration experts provided guidance to defense attorneys not only on deportability, but also on whether a noncitizen defendant would be able to apply for relief from deportation and the likelihood of obtaining such relief.

E. Lawful Resident Immigrants Pled Guilty in Reasonable Reliance on the Advice of their Lawyers and Others that They Had a Right to Seek Relief from Deportation

The experience of *amici* is that lawful permanent resident immigrants accused of crimes are generally extremely concerned about the immigration implications of their criminal cases. Many lawful permanent residents immigrated to this country at a young age, now work or study here, and have all their family here. Many have not been in the country in which they were born since early childhood, and some do not even know the language of that country. As a result, lawful permanent residents are often more worried about whether the disposition of their criminal case will lead to deportation than they are concerned about the criminal sentence. *See* Declaration of Larry Kupers filed in *Jun Li Tam v. Reno*, No. C-98-2835 MHP (9th Cir.) (see lodged document L-9) ("I cannot state strongly enough the enormous importance that his or her immigration status has to a Legal Alien and that it has been my experience that a Legal Alien will place that status first above all other considerations, including even guilt or innocence, when faced with criminal charges conviction of which could result in deportation"); *see also* Declarations of Cristina C. Arguedas & Nancy L. Clarence filed in *id.* (see lodged documents L-4 & L-6); Affidavit of Daniel Kanstroom filed with *amicus curiae* brief of the National Legal Aid and Defender Association & the New York State Defenders Association in *Bonhometre v. Reno*, No. 98-12333-NG (D. Mass.) (see lodged document L-8); *see also Mojica v. Reno*, 970 F.Supp. 130, 177 (E.D.N.Y. 1997) ("Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea"), *motion to withdraw appeal granted sub nom. Yesil v. INS*, 175 F.3d 287 (2d Cir. 1999).

In recognition of the severity of the penalty of deportation as a consequence of a criminal case, various ethical and professional standards require defense lawyers to advise noncitizen defendant clients about the immigration implications of pleading guilty. For example, the Standards for Criminal Justice of the American Bar Association have long provided that, where it is apparent that a defendant may face deportation as a result of a conviction, counsel "should fully advise the defendant of these consequences." *ABA Standards for Criminal Justice, Pleas of Guilty* (2d ed.), Standard 14-3.2, commentary at 75 (1982); *see also ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standard 14-3.2(f), commentary at 27 (1999) ("it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction") (see lodged documents L-1, L-2). In addition, the Performance Guidelines of *amicus* National Legal Aid and Defender Association likewise recognize that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation," and to explain to the client the potential consequences of any plea agreement. *NLADA Performance Guidelines for Criminal Defense Representation*, Guidelines 6.2(a)(3) and 6.3(a), at 77 (1994) (see lodged document L-3).[3]

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[3] While some courts have held that a defense lawyer's failure to advise regarding the immigration consequences of a guilty plea is insufficient basis for later *vacatur* of the plea because immigration consequences are not "direct" consequences of the conviction, the courts nevertheless generally recognize the independent responsibility of defense lawyers to advise regarding these "indirect" or "collateral" consequences. *See, e.g., United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985) ("It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us"); *see generally Michel v. United States*, 507 F.2d 461, 465-466 (2d Cir. 1974) (recognized defense counsel's obligation to advise about the "indirect consequences

To further ensure the required discussion between defense lawyer and noncitizen client regarding the immigration risks of pleading guilty, most of the high-immigrant population states – as well as Connecticut, the state where the respondent here pled guilty – require that trial judges advise defendants of potential immigration law consequences prior to accepting a guilty plea.[4]

Consistent with these standards and requirements, a leading treatise for defense lawyers advised:

> Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. Thus, the immigration consequences of a prosecution may totally alter the strategies chosen . . . . [An] attorney who suspects that his client is an alien has a duty to inquire and to protect his client's immigration status. Pleas and admissions must be approached with caution and with knowledge of the consequences . . . .

3 Bender's *Criminal Defense Techniques*, § 60A.01 and § 60A.02[2] (1999).

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the guilty plea may trigger," including deportation); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. 1994) ("attorney's duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral"); *People v. Soriano*, 240 Cal. Rptr. 328, 335-336 (Ct. App. 1987) (citing ABA standards as evidence of defense counsel's obligation to advise clients fully about collateral consequences of their guilty pleas); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) ("attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients").

[4] *See, e.g.*, Cal. Penal Code § 1016.5 (1982); Conn. Gen. Stat. § 54-1j (West 1994 & Supp. 1999); Fla. R. Crim. P. 3.172(c)(viii) (1989); N.Y. Crim. Proc. Law § 220.50(7) (McKinney Supp. 1999); Tex. Crim. P. Code Ann. § 26.13(a)(4) (West 1989).

In order to fulfill their ethical and professional responsibilities, defense lawyers questioned their clients to determine whether the client was a noncitizen subject to the deportation laws. Many of the large providers of legal services for indigent defendants specifically directed their attorneys *always* to determine whether a client was a citizen. For example, criminal defense attorneys of *amicus* The Legal Aid Society of the City of New York were instructed: "It is fundamental to effective representation that we find out whether a client is a citizen or not before entering a plea of guilty . . . *In no event should a guilty plea be taken before the staff attorney establishes whether the client is a United States citizen or not.*" Memorandum to All Staff Attorneys of The Legal Aid Society, entitled "Ascertaining Client Citizenship Status," attached to Declaration of Susan L. Hendricks, filed with *amici curiae* brief of The Legal Aid Society of the City of New York, et al., in *Calcano-Martinez v. INS*, No. 98-4033, 98-4214, 98-4246 (2d Cir.) (emphasis added) (see lodged document L-7).

Once it was determined that a client was a noncitizen, a defense lawyer was then required to advise the client regarding the immigration implications of any plea option. *See, e.g.*, Memorandum to All Legal Aid Society Staff Attorneys entitled "Important Immigration Concerns in Your Criminal Practice," attached to Hendricks Aff.; Memorandum to All Attorneys of the Public Defender Division of the State of Connecticut, dated Mar. 12, 1991 (including Immigration Law Bulleting advising defense lawyers: "It is of critical importance that the defense bar (1) identify their alien clientele (2) identify the issues and collateral consequences relating to their alien clientele and (3) deal with the issues at the pre-conviction stage, rather than at the post-conviction, immigration hearing level") (see lodged document L-17).

Before the 1996 amendments, defense lawyers carried out their duty to advise their noncitizen clients regarding immigration consequences of conviction based on the immigration practice aids, training programs, and expert resources described above. These resources informed them

that they could advise a lawful permanent resident immigrant client convicted of a deportable offense that the client would later be able to apply for a waiver of deportation. Obviously, defense lawyers could not assure a lawful resident client that a waiver would be granted. But defense lawyers could – and did – inform lawful resident clients of their right to apply, and these clients relied on this advice. *See, e.g.*, Murphy Aff., ¶ 7 ("Over the years, many of our lawful permanent resident clients have relied on information that we have provided regarding their statutory right to apply for relief from deportation when pleading guilty to a criminal charge that made them deportable from the United States, or when choosing not to pursue an appeal"); Kupers Decl., ¶ 11 ("We knew that 212(c) relief was available to legal resident defendants who had a drug-related conviction of no more than five years and we so advised our clients"); Kanstroom Aff., ¶ 5 ("I am personally aware of many such plea agreements that were expressly predicated on the defendant's belief that he or she might be able to apply for so-called Section 212(c) relief").

Moreover, the counsel that lawful permanent residents received from criminal defense lawyers regarding the availability of relief from deportation was frequently supported or informed by the advice of other lawyers, community advocates, and the experiences of permanent resident immigrant family members, friends, and neighbors who had been in deportation proceedings but were not deported. Thus, even if they did not discuss immigration issues with their criminal lawyer, many lawful permanent residents were generally aware that their guilty plea would not automatically result in deportation. As one district court put it, "[a] lawful permanent resident is, in any event part of a community and it is not unreasonable to attribute to him or her a basic sense of what happens to other members of the resident alien community who engage in criminal conduct." *Pottinger v. Reno*, 51 F. Supp.2d 349, 363 (E.D.N.Y. 1998), *aff'd*, 2000 U.S. App. LEXIS 33521 (2d Cir.).

The awareness of defense lawyers and their lawful resident clients regarding the right to apply for relief from deportation is also demonstrated by the fact that defense lawyers negotiated, when necessary, for a case outcome that would preserve eligibility for 212(c) relief. It was common practice, for example, for federal criminal defense lawyers to negotiate sentences that would lead to less than five years of imprisonment for lawful resident immigrant clients charged with drug and other offenses in order to preserve eligibility. As one senior federal defender litigator in California stated:

> Our annual training and our periodic office meetings and informal training sessions had ingrained in us the need, if at all possible, to plead an [sic] Legal Alien client in a drug case to a sentence of no more than five years in order to be eligible for relief from deportation in the form of the so-called "212(c) relief." . . . In fact, in any case in which a Legal Alien defendant charged with drug trafficking faced a sentence in excess of five years if convicted, I and every other attorney in The Federal Defender's Office, with the agreement of the client, tried to avoid trial (no matter what the ultimate strength of the government's case) and negotiate a plea bargain to achieve a sentence of no more than five years.

Kupers Decl., ¶¶ 11-12; *see also* Kanstroom Aff., ¶ 4 ("Prior to 1996, when IIRIRA was passed, it was, without exception, a central component of my advice to clients and attorneys that if a plea agreement could not be structured in such a way as to avoid rendering a person subject to deportation, the next best option would be to attempt to structure a plea agreement to preserve the possibility of discretionary relief from deportation"); *see also Tasios*, 204 F.3d at 546 (court found that the petitioner had entered a plea agreement with the government and pled guilty on the understanding that he would receive a sentence that would leave him eligible to seek relief from deportation); *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000) (same);

Tam v. Reno, 1999 U.S. Dist. LEXIS 3577, *3-5, 26 (N.D. Cal. 1999), *rev'd and remanded*, 2001 U.S. App. LEXIS 541 (9th Cir. 2001) (District Court found that availability of 212(c) relief played a role in petitioner's decision to plead guilty, and Court of Appeals remanded for evidentiary hearing to allow petitioner to pursue this claim).

In most criminal cases before the new laws, such negotiating with the express purpose of preserving eligibility for relief was not necessary because, under prior law, even conviction of the charged offense would not have triggered mandatory deportation (e.g., offense was not subject to prison sentence of five years or more). However, had lawful resident immigrant defendants who pled guilty prior to the 1996 amendments been aware of the new bars to relief from deportation, there are a number of steps they might have taken to avoid mandatory deportation. Some of these steps would be counterintuitive in the case of a U.S. citizen defendant, and a defense lawyer would not have advised such a course of action in the past. For example, based on the advice of his or her lawyer, a lawful resident client charged with a misdemeanor or low-level felony drug *sale* offense in the past might have decided to plead guilty in order to avoid prison time, even if the client professed innocence of any intent to sell the drugs found in his or her possession. The lawyer would have been correct to advise the client that the guilty plea with a sentence of little or no jail time would not trigger ineligibility for relief under the law at the time, even though the conviction could be deemed an aggravated felony. *See, e.g., United States v. Graham*, 927 F. Supp. 619 (W.D.N.Y. 1996) (New York misdemeanor criminal sale of marijuana is an aggravated felony). However, had the lawyer known that future laws were going to impose ineligibility for relief and mandatory deportation for any aggravated felony conviction regardless of sentence, the lawyer could have instead sought to negotiate a plea to an equivalent or higher level felony drug *possession* offense and a longer sentence in order to avoid conviction of an aggravated felony. *See, e.g., Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996)

(New York Class A felony possession of a controlled substance without sale element is *not* an aggravated felony for immigration purposes). Or, if the lawyer was unable to negotiate a non-aggravated felony plea, the client might have chosen to stand trial on the sale charge in the hope of acquittal. *See, e.g., Arias-Agramonte v. Commissioner of INS*, 2000 U.S. Dist. LEXIS 10724, *4-6, 43 (S.D.N.Y. 2000) (after citing findings of immigration judge regarding lawful resident immigrant who pled guilty to a deportable offense prior to the 1996 amendments despite evidence of his innocence and no prior criminal record, the court stated "[c]ertainly Arias, who at the time of his arrest was expecting his first child, and who pled guilty at least in part because he would only receive probation, may well have stood trial, with its concomitant risk of prison time upon a jury verdict of guilty, had the consequences been known to him").

The careful planning and counseling that would have gone into the choices faced by lawful permanent resident immigrants and their lawyers in criminal proceedings in the past if they had known of the mandatory deportation provisions of the new laws is reflected by the heightened responsibility now assigned to both trial judges and defense lawyers to warn defendants of the threat of deportation, *see ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standards 14-1.4(c) & 14-3.2(f) (1999) (see lodged document L-2), and by the numerous new immigration resources developed in order to enable defense lawyers to counsel their noncitizen clients properly regarding the impact of these provisions today.[5] These new standards

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[5] Examples of specialized manuals that have been prepared for defense lawyers since 1996 are: Norton Tooby with Katherine A. Brady, *Criminal Defense of Immigrants* (Law Offices of Norton Tooby, National Ed., 1999); Maria Baldini-Potermin, *Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios* (Minnesota Bar Association, 1998 – 2000); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State* (New York State

and resources underscore how different would have been the advice defense lawyers gave to a noncitizen client considering a guilty plea in the past if they knew that what then seemed to be a favorable plea deal would now trigger mandatory deportation. For example, in its commentary to its new plea standards, the ABA observed:

> The Immigration and Nationality Act ("INA"), in the wake of the 1996 amendments . . . constitutes a great threat to non-citizen defendants who are considering a plea of guilty . . . The expansion of the "aggravated felony" list is significant because conviction of an aggravated felony generally means certain and speedy deportation given that the defendant will not, under the statute, be eligible for most discretionary relief from removal. Under the amended INA, then, a plea deal that might otherwise seem attractive – for example, a suspended 1-year sentence for misdemeanor theft – may often look considerably different once it is determined that that plea would in fact be deemed an "aggravated" felony conviction leading to the alien client's swift deportation.

Id., Standard 14-1.4(c), commentary at 58, n.96 (1999).[6]

Indeed, if deportation had been a certainty, rather than the calculated risk it was before the 1996 amendments, lawful resident immigrant defendants would have

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Defenders Association, 1st and 2nd eds., 1998, 2000). In addition, several new state-based initiatives have been established to provide training and consultation resources for defense lawyers.

[6] Several recent court decisions confirm the ABA's conclusion that even a guilty plea to a misdemeanor theft offense – which might have been a good plea deal from a defense perspective in the past – could now be deemed an "aggravated felony." *See, e.g., Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000) (held that "aggravated felony" term includes conviction of a misdemeanor shoplifting offense with suspended sentence of twelve months in prison).

been much less likely to plead guilty in many circumstances. Before agreeing to plead guilty, many specifically asked their defense lawyers what chance they would have of being granted relief from deportation, and then weighed the *likelihood* of deportation just as they weighed other aspects of a plea offer, such as the probable sentence, the availability of parole, and the overall disruption that the plea would cause to themselves and their families. Sadly, those lawful permanent residents who tended to rely the most on the possibility of a waiver of deportation were those with the strongest equities, e.g., individuals who had lived virtually their entire lives in the United States, whose family members were all in the United States, or who had served in the U.S. military. Even if such a permanent resident had no prior criminal record and the evidence of guilt was weak, he or she might nevertheless have pled guilty based on information or advice that deportation would not be automatic and that they would have a good chance of having their 212(c) application granted if they could demonstrate those very same factors – family, job, residence, etc. – that made it more likely that the lawyer would be able to negotiate a plea with little or no jail time.[7]

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[7] Many courts have concluded that the possibility of a waiver of deportation could be a critical factor in the plea-bargaining process. *See, e.g., Tasios*, 204 F.3d at 551 ("[P]rior to the passage of AEDPA the legal effect of pleading guilty . . . was mitigated by the realistic possibility of obtaining a waiver under § 212(c)"); *Mattis v. Reno*, 212 F.3d 31, 39-40 (1st Cir. 2000) ("[T]here is reason to believe that there might be some aliens who [entered guilty pleas before April 1996] in actual and reasonable reliance on the availability of § 212(c) relief"); *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime involving controlled substances would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented").

In sum, the experience of *amici* is that, prior to the 1996 amendments, our lawful resident immigrant clients understood that deportation was generally not automatic upon conviction of a deportable offense. Our lawful resident clients often pled guilty in reliance on this understanding when they could have gone to trial or made other choices in their criminal case in order to seek to avoid mandatory deportation had they had notice of what future legislation would bring.

II. THE COURT BELOW CORRECTLY FOUND THAT THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO PRE-AMENDMENT GUILTY PLEAS IS IMPERMISSIBLY RETROACTIVE

The criminal justice system relies heavily on the willingness of individuals to plead guilty and forego their right to a jury trial. In fact, more than 90 percent of criminal convictions today are obtained by guilty plea. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Section 5: Judicial Processing of Defendants*, Tables 5.30, 5.51 in *Sourcebook of Criminal Justice Statistics 1999*, (2000) (over 95 percent of federal convictions and over 91 percent of felony convictions in state court are obtained by guilty plea). Without this willingness of the criminally accused to plead guilty, the wheels of justice would most certainly grind to a screeching halt. As the Court has stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971).

Given the importance of the rights relinquished when an individual agrees to plead guilty,[8] the integrity and fairness of the plea bargaining process requires strict application of rules to protect the expectations underlying the plea.[9] These include not only the Ex Post Facto Clause

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[8] Those accused of crimes who agree to plead guilty – sometimes even when innocent of the criminal charges – give up fundamental rights at the core of our nation's Bill of Rights. They give up not only their right to a trial by a jury of their peers, *Duncan v. Lousiana*, 391 U.S. 145 (1968), but also their rights to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400 (1965), to present witnesses in one's defense *Washington v. Texas*, 388 U.S. 14 (1967), to remain silent, *Malloy v. Hogan*, 378 U.S. 1 (1964), and to be convicted by proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358 (1970). Recognizing the significance of an individual's agreement to plead guilty, the Court has recognized the importance of counsel during plea negotiations, *Brady v. United States*, 397 U.S. 742, 758 (1970), the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), and the requirement that a prosecutor's plea bargaining promise be kept, *Santobello*, 404 U.S. at 262.

[9] Retroactive application of mandatory deportation provisions compromises the integrity of the plea bargaining process by disrupting the legitimate expectations not only of the noncitizen defendant but also of other actors in the criminal justice system. For example, retroactive application of new laws to change the legal effect of a guilty plea undermines the efforts of defense attorneys who try to comply with ethical standards and to provide effective counsel to noncitizen defendants regarding the consequences – both direct and indirect – of a plea. Ironically, those defense attorneys who made the best efforts to provide effective counsel on the immigration implications of guilty pleas are the attorneys whose clients may have most relied on the availability of relief from deportation. In addition, retroactive application undermines the expectations of prosecutors who may have agreed to a lesser or alternative plea, or a lenient sentence, prior to the 1996 amendments with the expectation that it would allow the defendant to return sooner to his or her home and family in the United States. *See Harmelin*

prohibition on retroactive application of later "punitive" legislation, but also the presumption against retroactivity of other subsequently enacted laws that change the consequences of the plea, even if the new laws are not deemed punitive in nature. As the Court has stated:

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen . . . . In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.*

Lynce v. Mathis, 519 U.S. 433, 439-440 (1997) (emphasis added).[10]

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v. Michigan, 501 U.S. 957, 1008 (1991) (prosecutorial discretion allows for consideration of individualized circumstances to ameliorate the effect of mandatory sentences). Likewise, retroactive application of mandatory deportation laws also undermines the expectations of a trial judge who accepted a plea or imposed a sentence also with the expectation that the defendant would be permitted to return to home and family.

[10] Although the Court here need not reach the background constitutional issues implicated by retroactive applications of new rules to past conduct, *amici* note that this case does raise Due Process Clause concerns. *See Landgraf*, 511 U.S. 244, 266 ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation"). In addition, were the Court not to apply the traditional presumption against retroactivity, this case would provide an appropriate vehicle for the Court to reconsider the current viability of its prior decisions holding that deportation laws are not subject to the Ex Post Facto Clause. *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least*

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court reaffirmed the traditional presumption against retroactivity. The Court stated that the inquiry as to whether application of a new statute would have impermissible retroactive effect requires a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Id.* at 269. The determination is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* One way that application of a new statute to past events will be found to have retroactive effect is if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . . " *Id.* (quoting Justice Story in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, No. 13,156 (C.C.D.N.H. 1814)).

The government's application of the 1996 deportation relief bars to lawful permanent residents convicted of committing deportable offenses prior to the new law unquestionably eliminates a legal right – eligibility to apply for 212(c) relief from deportation – or attaches a new disability – ineligibility to apply – based on criminal conduct and convictions that occurred in the past. Under prior law, convicted long-time lawful permanent residents faced possible, but not certain, deportation. However, if the 1996 amendments are applied to them, their statutory right to seek 212(c) relief is taken away and deportation becomes virtually inevitable. The government's position changes a possibility of deportation into a certainty of deportation.

The Court's retroactivity jurisprudence establishes that such a change in legal risk has impermissible retroactive effect when applied to prior conduct or transactions even if the new law does not change the maximum extent of a party's liability. *See, e.g., Hughes Aircraft Company v.*

Some of the Constitution's Criminal Procedure Protections Must Apply, 52 Adm. L.R. 305 (Winter 2000).

United States ex rel. Schumer, 520 U.S. 939 (1997) (finding retroactive effect when a 1986 amendment was applied to cause a private party to lose a prior defense against private suits for submitting a false claim to the government, even though elimination of the defense in question did not increase the defendant's liability exposure because the defense had never been available in suits brought by government litigators).

Moreover, the Court's Ex Post Facto Clause case law, to which the Court turns to determine what civil as well as criminal law consequences have a genuine retroactive effect,[11] has long recognized the retroactive effect of a change from a discretionary penalty system to a system of mandatory penalties. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) (held that a statute eliminating parole eligibility for offenses subject to parole under the law at the time of commission was impermissible as an ex post facto law); *Lindsey v. Washington*, 301 U.S. 397 (1937) (held that a statute changing a maximum sentence to a mandatory sentence for offense committed prior to the statute's enactment is an impermissible ex post facto law). In *Lindsey*, the Court stated:

> Removal of the *possibility* of a sentence of less than fifteen years . . . operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old . . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of *all* opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15 year term.

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[11] *See, e.g., Hughes Aircraft*, 520 U.S. at 948 (citing *Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)); *Landgraf*, 511 U.S. at 269 n. 23 (citing *Miller v. Florida*, 482 U.S. 423 (1987)).

Id. at 401-02 (citations omitted) (emphasis added).[12] Similarly, taking away the statutory right to apply for discretionary 212(c) deportation relief, thus making deportation mandatory, must be considered retrospective. *See Tasios*, 204 F.3d at 552 ("As cases decided under the Ex Post Facto Clause establish, any change of outcomes from a discretionary relief to one of prescribed outcomes is retroactive").

The change in the legal consequence of pre-amendment guilty pleas here is graphically illustrated by the disruption of the reasonable reliance of lawful resident immigrants on prior law, as described in Point I above. Reasonable reliance on prior law is a hallmark indicator of whether a new law has retroactive effect. *See Landgraf*, 511 U.S. at 282-83 (a "legal change that would have an impact on private parties' planning" operates retrospectively). Thus, not surprisingly, a growing number of courts have found that the government's application of new deportation laws barring 212(c) relief is impermissibly retroactive based on the reasonable reliance of lawful permanent resident immigrants on their eligibility under the law at the time they were convicted.[13]

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[12] *See also Lynce*, 519 U.S. 433 (held that cancellation of provisional early release credits awarded to alleviate prison overcrowding was a retroactive effect in violation of the Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24 (1981) (held that a new law repealing an earlier statute and reducing amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence violated Ex Post Facto Clause).

[13] For example, the Fourth Circuit last year retreated from its prior decision in *De Osorio v. INS*, 10 F.3d 1034 (4th Cir. 1993), in which the court had suggested that the possibility of a waiver of deportation was not relevant to noncitizen decision-making in the criminal process, stating: "[W]e conclude that the observations made in *De Osorio* do not account for the essential retroactive consequences of removing the availability of 212(c) relief." *Tasios*, 204 F.3d at 551. The Fourth Circuit found that

In sum, many lawful permanent residents pled guilty in specific reliance on the real promise of avoiding deportation offered by the statutory right to apply for 212(c) relief, or in general reliance on knowledge that there would be some consideration of the equities in their cases before any government decision to carry out a deportation. As discussed in Point III below, such reliance is not necessary to show the retroactive effect of the government's application of AEDPA Section 440(d) and IIRIRA Section 304(b). Nevertheless, the reasonable reliance on prior law confirms and illustrates the retroactive effect of the application of these new laws to pre-enactment pleas. Thus, the Court should affirm the lower court's application of the presumption against retroactivity at least with respect to lawful resident immigrants who agreed to plead guilty prior to the new laws.[14]

AEDPA 440(d) would upset reasonable, settled expectations and change the legal effect of prior conduct if applied to guilty pleas before AEDPA's effective date, and thus should not be applied to *any* case based on a pre-AEDPA guilty plea. As the Fourth Circuit explained: "By withdrawing the availability of [§ 212(c)] relief, AEDPA § 440(d) worked a *fundamental change* in the legal effect of such a plea . . . ." *Id.* at 552 (emphasis added).

[14] Although the court below limited the extent of its holding to individuals who pled guilty prior to the 1996 amendments, lawful permanent resident immigrants also relied on the availability of relief from deportation in making other choices during criminal proceedings, such as a decision to reject an offered plea deal and go to trial where relief eligibility existed under prior law even if the individual was found guilty after trial of the more serious charged offense, or a decision to fight certain charges more than others at trial, or a decision not to appeal a conviction after trial. Thus, although the choice whether to plead guilty is one of the most important decisions a defendant faces, it is by no means the only choice that may be affected by the availability of relief from deportation.

III. IN ANY EVENT, THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO THE UNDERLYING ORIGINAL CONDUCT IS IMPERMISSIBLY RETROACTIVE

In order to determine whether application of a new law to past conduct has an impermissible retroactive effect, what matters is simply "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. Principles of fair warning require no less. As the Court stated in *Landgraf*:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; . . . . For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Id., at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Thus, in *Landgraf* and other cases where the Court has analyzed whether a new civil statute has impermissible retroactive effect, the essential question is not whether the person later expressly relied on a given understanding of the law, but whether applying the new law to the original past conduct changes the consequences of that conduct. *See id.* at 283-284 (finding retroactive effect of new punitive and compensatory damages and jury trial provisions of the Civil Rights Act of 1991 even though there was no finding of reliance on prior law and the sexual harassment conduct at issue was already illegal at the time of the conduct); *Rivers v. Roadway Exp. Inc.*, 511 U.S. 298 (1994) (finding retroactive effect of new right of action for discriminatory contract terminations in the Civil Rights Act of 1991 even though the parties believed that the right of action existed when they acted and therefore they could not have relied on prior law); *Hughes Aircraft*, 520 U.S. at 948 (finding retroactive effect when a private party lost a

defense against private suits for submitting a false claim to the government, even though the private party never had such a defense against a government suit and there was no showing that the party relied on the government failing to pursue a suit).

The Court's retroactivity analysis in its ex post facto decisions also focus on whether applying the new law at issue to past conduct changes the legal consequence of the original criminal conduct, rather than on whether the affected individual later acted in reliance on prior law. In these decisions, the crucial benchmark for determining retroactive effect of new penalties for criminal conduct is the law that was in existence on the date of that original conduct, as opposed to the law on the date of plea or conviction. *See, e.g., Miller v. Florida*, 482 U.S. 423 (1987) (found retroactive effect when the government applied revised sentencing guidelines that went into effect between the date of the petitioner's offense and the date of his conviction); *see also Johnson v. United States*, 529 U.S. 694 (2000) (held that original criminal conduct, not a subsequent violation of supervised release, was the operative event for retroactivity analysis). This is true even if the new statute applies only upon "conviction." *See Lindsey v. Washington*, 301 U.S. at 398, *rev'g State v. Lindsey*, 61 P.2d 293, 294 (Wash. 1936) (court found retroactive effect when the government applied a new sentencing statute that was triggered "[w]hen a person is convicted" to an individual who committed offense on April 15, 1935, even though criminal proceedings did not commence until after the new law was enacted on June 12, 1935).

In short, the Court's decisions in both the civil and criminal contexts recognize that people have a right to know the possible legal consequences of their actions at the time of their original conduct, whether or not they will be able to demonstrate subsequent acts in reliance on that knowledge. Indeed, it would be contrary to our system of justice, not to mention largely unfeasible and tremendously burdensome, for persons to have to prove actual individual reliance on prior law before they can avoid the

'adverse consequences of a new law. Rather, in our system of justice, it is presumed that a person acts in light of the law at the time of his or her actions. As one U.S. district judge stated:

> Individuals are presumed to act against a backdrop of legal obligations. If they were not, there would be little problem with the retrospective application of many laws; there are likely to be few instances of an individual poring over a statute book before acting. "Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act."

Pena-Rosario v. Reno, 83 F. Supp.2d 349, 366 (E.D.N.Y. 2000) (Gleeson, J.) (quoting *Maria v. McElroy*, 68 F. Supp.2d 206, 229 (E.D.N.Y., 1999)).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted,

JOSHUA L. DRATEL
National Association of Criminal Defense Lawyers

MANUEL D. VARGAS*
SEJAL R. ZOTA
New York State Defenders Association

**Counsel of Record (Other Organizations Listed in Appendix A)*

APPENDIX A: ORGANIZATIONAL STATEMENTS OF INTEREST

The **National Association of Criminal Defense Lawyers** (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 10,000 attorneys. NACDL is affiliated with 80 state and local criminal defense organizations with which it works cooperatively on issues related to criminal defense. Thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The **Association of Federal Defenders** (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. One of the AFD's missions is to file *amicus curiae* briefs to ensure that the positions of indigent *habeas corpus* petitioners previously convicted of criminal offenses are adequately represented.

The **California Public Defenders Association** (CPDA) has a membership of over 3,000 public defenders and private defense counsel. The CPDA attorney members act as legal counsel for over 95 percent of the indigents accused of criminal conduct in California. The CPDA, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney

members in legislative and significant issues at the appellate court levels. Due to the numerous and complex immigration laws and regulations, criminal prosecutions and convictions can and do have serious adverse consequences for a substantial percentage of the defendants represented by our member attorneys, and thus the CPDA and its members have great interest in the outcome of this case.

The **Committee for Public Counsel Services** (CPCS), the Massachusetts public defender agency, is statutorily mandated to provide counsel to indigent defendants in Massachusetts criminal proceedings. G.L. c. 211D, §5. The issue presented in this case is of immediate importance to CPCS because many of its clients' criminal cases are resolved by a guilty plea or by an admission to sufficient facts. In addition, because many of its clients are not citizens of the United States, their guilty pleas have significant immigration consequences. As a result, CPCS attorneys are trained, and then required to advise clients not only of the nature of the plea colloquy, the constitutional rights they are giving up in pleading guilty, and the effect of the plea, but also the potential consequences of deportation, exclusion from admission to the United States, or denial of naturalization. *See* M.G.L. c. 278 § 29D; *CPCS Performance Standards.*

The **Cook County Public Defender's Office** is an independent Cook County agency operating within the largest unified court system in the world. Services are provided by Administrative, Chicago, Suburban and Countywide Operations with multiple offices located in Chicago, Illinois, and five adjacent suburbs. The office employs 567 lawyers and provides legal representation to

nearly 400,000 people annually who cannot afford to hire a private lawyer, in adult criminal cases and appeals resulting from conviction. Because of the diversity of Cook County's population, a large percentage of the Office's clients are not United States citizens.

The **Division of Public Defender Services of the State of Connecticut** is a statewide public defender system responsible for providing legal representation to indigent persons in adult criminal cases, juvenile delinquency matters, habeas corpus proceedings, and appeals. The Division represents individuals in approximately 75,000 cases annually before the Connecticut courts. Attorneys in the Division handle approximately 75% of all cases in the 13 Judicial Districts and one-third of all cases in the 22 Geographical Areas of the Superior Court, as well as a significant percentage of cases before the Connecticut Supreme and Appellate courts. The Division of Public Defender Services is an independent agency of the State of Connecticut.

The **Florida Public Defender Association** consists of the State of Florida's twenty elected Public Defenders. Florida's Public Defenders have a constitutional and statutory duty to represent poor people accused of crimes in Florida's courts. The Florida Public Defender Association has an interest in matters affecting the administration of justice and the practice of criminal defense in the State of Florida. Florida is the state with the third highest percentage of immigrants among its population, with more than eighteen percent of Florida's fifteen million people born outside the country.

The **Los Angeles County Public Defender** is the primary trial counsel in the County of Los Angeles, California for all persons charged with crimes who are indigent and unable to afford private counsel. The Office is the largest office of trial counsel for criminal defendants in the State of California, with over six hundred trial lawyers. The Office represents tens of thousands of defendants each year in criminal proceedings who are long-term permanent resident immigrants. In addition, the Office is involved in post-conviction litigation in cases where long-term permanent resident immigrants are facing mandatory deportation as a result of the 1996 amendments to the deportation laws.

The **National Legal Aid and Defender Association** (NLADA) is a private, non-profit membership organization based in Washington, D.C. Founded in 1911, the NLADA is the only national organization devoted solely to assuring the delivery of high quality legal services to poor people. The NLADA often appears as an *amicus* party on issues of broad concern that address the constitutional right to counsel and equal access to and fairness in the judicial system. Its national membership includes members of the indigent defense and civil legal service bars, and professionals who provide related services. Many of the nation's public defender organizations, as well as assigned counsel and private criminal defense practitioners, are NLADA members. NLADA member lawyers have also represented thousands of long-term lawful permanent resident immigrants in criminal proceedings.

The **New York State Association of Criminal Defense Lawyers** (NYSACDL) is a non-profit membership organization of more than 1,100 attorneys who practice criminal defense law in the State of New York. Its purpose is to assist, educate, and provide support to the criminal defense bar to enable them to better serve the interest of their clients and to enhance their professional standing.

The **New York State Defenders Association** (NYSDA) is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Its objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

The **Public Defender of Florida's Eleventh Judicial Circuit, Honorable Bennett H. Brummer,** is the elected state constitutional officer charged with representing poor people accused of crimes in Miami-Dade County. Miami-Dade is Florida's most populous county, and the Office of the Public Defender employs 200 lawyers to handle approximately 90,000 cases a year. In many of those cases, attorneys are called upon to advise clients of the potential immigration consequences of plea bargains. Half of Miami-Dade County's more than two million

residents were born outside the United States, and Miami-Dade has the highest immigration rate of any urban county nationwide.

The **Texas Criminal Defense Lawyers Association** is an organization of more than 2,300 attorneys in Texas who represent people accused of crimes. The application of immigration laws to criminal convictions affects a large number of the clients of Association members who are not citizens of the United States. Since Texas is a border state, Association members regularly represent immigrants. The retroactive application of the immigration laws has exposed many Association members to complaints and disciplinary hearings regarding ineffective assistance of counsel. For these reasons, the outcome of this case is of critical interest to Association members.

The Legal Aid Society of the City of New York is a private, non-profit legal services agency that represents poor New York City residents who cannot afford to hire a lawyer. The Criminal Defense Division, the largest division of The Society, employs more than 400 attorneys. Since 1965, the Division has been the primary public defender for indigent persons who are prosecuted for crimes in state courts in New York City. In fiscal year 1999, the Division represented more than 180,000 clients in New York, Kings, Queens, and Bronx counties. Because of the diversity of the New York City population, a large percentage of the Division's clients are not United States citizens.

The **Washington Defender Association** (WDA) is a non-profit membership organization comprised of public defenders, assigned counsel and legal aid attorneys

throughout the State of Washington. WDA's mission is to promote, assist and encourage public defense systems which ensure that all accused persons in every court receive effective assistance of counsel. In recognition of the severe immigration consequences that may result to noncitizen defendants, the WDA operates the Washington Defenders Immigration Project (WDIP). WDIP provides case-by-case technical assistance and training to public defenders and assigned counsel representing noncitizen clients throughout Washington State.

APPENDIX B: PARTIAL LIST OF PRE-APRIL 1996 PUBLICATIONS AND PRACTICE MATERIALS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

NATIONAL MANUALS/TREATISES/PRACTICE MATERIALS:

1. Larry Ainbinder, updated by Hilary Hochman, Ch. 17, *Special Considerations in Representing the Non-Citizen Defendant,* in *Defending A Federal Criminal Case* (Federal Defenders of San Diego, an updated Chapter 17 has been included in the nationally distributed manual from 1983 – 2000).

2. Kari Converse, *Keeping Dorothy in Kansas After Ozkok: New Strategies for Defending Non-Citizens,* The Champion, Mar. 1989, at 8 (The National Association of Criminal Defense Lawyers).

3. Jeffrey B. Fawell & Robert S. White, *Effects Of Recent Immigration Legislation On Criminal Aliens & Defense Practitioners,* The Champion, Sept./Oct. 1995, at 10 (The National Association of Criminal Defense Lawyers).

4. Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions,* 23 Am. Crim. L. Rev. 425 (1986).

5. C. Gordon, et al., *Immigration Law and Procedure* (Bender, 1988 –).

6. Steven D. Heller, *Criminal Convictions And Aliens: Preventing The 'Collateral Consequence' Of Deportation,* 94-10 Immigr. Briefings 1 (1994).

7. Nancy Hollander & Kari Converse, Immigration Implications for the Alien Defendant (pts. 1 & 2), The Champion, May 1986, at 29, June 1986, at 16

(The National Association of Criminal Defense Lawyers).

8. Tova Indritz, *Representing a Non-Citizen Client in a Criminal Case* (training materials prepared for the annual Federal Judicial Center orientation seminar for Assistant Federal Defenders in Nov. 1994)

9. Katznelson, Conley & Martin, *Non-U.S. Citizen Defendants in the Federal Court System*, 8 Fed. Sentencing Rptr. 259 (1996).

10. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law And Crimes* (West Group, 1984-1999).

11. Kowalski, *Sentencing Options for the Deportable Non-Citizen*, 8 Fed. Sentencing Rptr. 259 (1996).

12. Ira J. Kurzban, *The Immigration Act of 1990*, The Champion, Apr. 1991, at 5 (The National Association of Criminal Defense Lawyers).

13. McWhirter & Sands, *A Primer for Defending a Criminal Immigration Case*, 8 Geo. Imm. L. J. 23 (1994).

14. Norton Tooby, *Criminal Defense of Noncitizens*, 22 Immigration Newsletter, Nos. 3 and 4 (National Immigration Project 1995).

15. Alan Vomacka, *Immigration Considerations for the Criminal Defense Lawyer*, (pts. 1 & 2) The Champion, Apr. 1982, at 9, May 1982, at 4 (The National Association of Criminal Defense Lawyers).

STATE MANUALS/TREATISES/PUBLICATIONS/ PRACTICE MATERIALS:

1. Jan Bejar, *Exclusion or Deportation based on Narcotics and Alien Smuggling Offenses*, Mar. 1990 (article written for federal and state defenders practicing in San Diego area).

2. Jan Bejar, *Representing Aliens in Criminal Proceedings: Some Pitfalls for the Criminal Practitioner to Avoid*, California Attorneys For Criminal Justice Forum, Apr. 1994.

3. Jim Benzoni, *Defending Aliens in Criminal Cases* (training materials prepared for criminal defense lawyers attending Continuing Legal Education programs in Iowa from 1994-1997).

4. Katherine A. Brady, et al., *California Criminal Law And Immigration* (Immigrant Legal Resource Center, 1990-1999).

5. Katherine A. Brady & Hon. Dana Marks Keener, Ch. 48, *Representing a Noncitizen Criminal Defendant in California Criminal Law Procedure And Practice* 1285 (Continuing Education of the Bar of California, 3rd ed., 1994 – 1996).

6. Katherine A. Brady & David S. Schwartz, *Public Defenders Handbook On Immigration* (California Public Defenders Association, 1988).

7. Katherine A. Brady, *New Developments in Representation of Non-Citizen Defendants*, 19 California Attorneys For Criminal Justice Forum, No. 2, at 30 (1992).

8. Jeffrey N. Brauwerman & Stephen E. Mander, *IMMACT 90 Revisions Regarding Immigration Consequences Of Criminal Activity*, 66-May Florida Bar Journal 28 (1992).

9. Sarah M. Burr, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients*, 1990, 1991 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York).

10. Robert Frank, *Criminal Defense Of Foreign Nationals*, 167-Mar. N.J Law. 36 (1995).

11. Josie Gonzalez, *Immigration Consequences of Criminal Convictions for "Amnesty" Applicants and Other Immigrants*, Jan. 1988 (training materials prepared for the Los Angeles Public Defender's Office).

12. J. Gonzalez, *Representing Accused Non-Citizens*, California Attorneys for Criminal Justice, Statewide Criminal Law Seminar Syllabus (May 6, 1978).

13. *Immigration Issues for Criminal Defense Lawyers*, Ch. 17, in *Deborah T. Creek Criminal Practice Institute Trial Manual* (Public Defender Service for the District of Columbia, 1995).

14. D. Kanstroom, *Immigration Consequences of Criminal Convictions* (training materials prepared for the 1996 Annual Statewide Training Conference of the Committee for Public Counsel Services (Massachusetts Public Defender)).

15. Daniel Kanstroom, *Immigration Consequences of Criminal Offenses* in *Massachusetts Criminal Defense* 106 – 115 (Eric Blumenson & Stanley Z. Fisher ed., Butterworth Legal Publishers, 1992; 1993 update).

16. Daniel M. Kowalski & Daniel C. Horne, *Defending the Noncitizen*, 24 Colo. Law. 2177 (Specialty Law Column, 1995).

17. John J. LaCava, *Immigration Consequences of Criminal Convictions: A Primer for the Criminal Lawyer*, Nov. 1990 (training materials disseminated to all the Connecticut Public Defender offices by the Criminal Justice Section of Connecticut Bar Association).

18. Margaret McManus, *Immigration Consequences of Criminal Conduct*, Sept. 1985 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York).

19. Robert Pauw & Jay Stansell, *Immigration Consequences of Criminal Convictions*, 1992, 1995 update

(training materials prepared by Northwest Immigrants Rights Project for criminal defense attorneys in Washington).

20. Mary L. Sfasciotti, *Representing Aliens in Criminal Cases – Recent Amendments to the Immigration and Naturalization Act*, 79 Ill. B.J. 78 (1991).

21. Dennis M. Sullivan, *Immigration: The Consequences of A Criminal Conviction*, 63-Apr. Wis. Law. 16 (1990).

22. Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30-Jun Ariz. Att'y 15 (1994).

23. The Legal Aid Society Criminal Appeals Bureau, *Representing Clients Who are not United States Citizens: Immigration Consequences of Convictions and Appellate Considerations*, (1992).

24. Alfred Zucaro, Jr. & Beth L. Mitchell, *Criminal Convictions: The Immigration Consequences*, 63-May Fla. B.J. 36 (1989).

APPENDIX C: EXAMPLES OF PRE-APRIL 1996 TRAININGS FOR CRIMINAL DEFENSE LAWYERS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

NATIONAL

The National Immigration Project of the National Lawyers Guild sponsored the following Continuing Legal Education (CLE) seminars for criminal defense lawyers:

- Jan. 28, 1984, Boston, MA, "Immigration Consequences of Criminal Convictions"
- Feb. 4, 1984, San Francisco, CA, "Immigration Consequences of Criminal Convictions"
- Feb. 11, 1984, Los Angeles, CA, "Immigration Consequences of Criminal Convictions"
- Mar. 17, 1984, Sacramento, CA, "Immigration Consequences of Criminal Convictions"
- May 11, 1984, New York, NY, "Immigration Consequences of Criminal Convictions"
- June 25, 1984, Portland, OR, "Immigration Consequences of Criminal Convictions"
- June 25, 1984, Seattle, WA, "Immigration Consequences of Criminal Convictions"
- Nov. 18, 1985, Washington, D.C., "Immigration Consequences of Criminal Convictions"
- Dec. 6, 1985, Miami, FL, "Immigration Consequences of Criminal Convictions"
- Sept. 29, 1989, South Padre Island, TX, "Immigration Consequences of Criminal Convictions"
- Jan. 19, 1990, Albuquerque, NM, "Trial Practice Skills: Drug Conviction 212(c) Waivers"

- May 30, 1990, Austin, TX, "Immigration Consequences of Criminal Conduct: Drug Convictions, Weapons Offenses, Aggravated Felonies and Crimes Involving Moral Turpitude"

- Nov. 10, 1990, San Francisco, CA, "Trial Tactics, Practice and Substance: 212(c) Waivers of Excludability"

- July 31, 1991, Seattle, WA, "Specialized Issues in the Immigration Act of 1990" [includes waivers and criminal grounds of deportability]

- Jan. 31, 1992, Chapel Hill, NC, "Defending Against Deportation . . . " [includes discussion of grounds of deportation and forms of relief]

- Aug. 4, 1993, New York City, NY, "Justice for Respondents in Immigration Proceedings: Contesting Deportability and 212(c) Waivers for Criminal Offenders"

Federal Judicial Center (FJC) is the research and education agency of the federal judicial system. It has been training federal defenders across the country since 1971. The FJC conducts a national seminar for Assistant Federal Defenders every year, which often includes a segment on the immigration consequences of criminal convictions. For example, in Nov. 1994, the FJC conducted a training on "Considerations in Representing a Non-Citizen Client" at the "Orientation Seminar for Assistant Federal Defenders" in Phoenix, Arizona.

STATES

Jan Bejar, an immigration attorney in San Diego, California, has routinely provided annual updates of the immigration consequences of criminal convictions to the Federal Defenders of San Diego since 1990. He has also conducted immigration seminars for at least three of the annual Criminal Justice Act (CJA) Seminars in San Diego, a seminar required for admission to the San Diego CJA panel of court-appointed criminal defense attorneys. One such presentation was on June 4, 1991 on "The 1990 Changes in Immigration Consequences for a Criminal Defendant."

Anne Benson, while employed at the Northwest Immigrants Rights Project in Seattle, Washington, often trained Seattle public defenders about the immigration consequences of criminal convictions. For example, on Mar. 21, 1996, she provided training to The Defender Association (the largest public defender agency in Seattle-King County) on "Immigration Law & Crimes."

Jim Benzoni, an adjunct professor for immigration law at Drake University Law School in Iowa and one of the main attorneys doing immigration and criminal work in that state, has given numerous CLE's on the subject, particularly between 1994-1996. For instance, on Aug. 3, 1994, he conducted a CLE presentation on "Defending Aliens in Criminal Cases," which was sponsored by the Iowa Association of Criminal Defense Lawyers.

Katherine Brady is a national expert on the interplay of criminal and immigration law and has authored many publications on the subject. A partial list of CLE seminars, sponsored or co-sponsored by the **Immigrant Legal**

Resource Center, that she has given to train criminal defense attorneys in California to advise properly noncitizen clients of the immigration effect of criminal convictions follows:

- Sept. 1991, San Francisco, "Immigration Consequences of Crimes"
- Sept. 1991, Davis, "Immigration Consequences of Crimes"
- Oct. 1991, Los Angeles, "Immigration Consequences of Crimes"
- Nov. 1991, San Diego, "Immigration Consequences of Crimes"
- Mar. 1993, Davis, "Immigration Consequences of Criminal Convictions"
- Mar. 1993, San Diego, "Immigration Consequences of Criminal Convictions"
- Apr. 1993, San Francisco, "Immigration Consequences of Criminal convictions"
- Apr. 1993, Los Angeles, "Immigration Consequences of Criminal Convictions"
- Feb. 1995, San Francisco, "Immigration and Crimes"
- Apr. 1995, San Francisco, "Immigration Consequences of Crimes"
- May 1995, Los Angeles, "Immigration Consequences of Crime"
- May 1995, Fresno, "Immigration Consequences of Crimes"
- June 1995, San Diego, "Immigration Consequences of Crimes"

Victor Castro, an immigration attorney in Santa Clara, California, regularly provides training on the immigration consequences of criminal convictions for the Santa Clara County Public Defender's Office. In 1992, he also conducted a trainer for the Santa Clara criminal bar on the "Immigration Consequences of Criminal Convictions, Relief available to Noncitizens, and How to Strategize to Provide a Legal Defense."

Federal Defenders of San Diego sponsors the annual Criminal Justice Act Seminar in San Diego, which is required for admission to the San Diego CJA panel of court-appointed attorneys. The seminar often includes a segment on the immigration consequences of criminal convictions. The Federal Defenders of San Diego also sponsors other immigration seminars for the criminal defense bar in San Diego and the surrounding areas such as the "Crime Control Act of 1994," part of which focused on "Aliens and Immigration Enforcement" on Dec. 7, 1994.

Daniel Kanstroom, the Director of the Boston College Immigration and Asylum Project and an Associate Clinical Professor at Boston College Law School, has for years provided training for public defenders about the interplay of criminal law and immigration law. One such presentation was on "Immigration Consequences of Criminal Offenses," on Mar. 8, 1995, for the Dorchester Bar Association.

The Legal Aid Society of the City of New York, Criminal Defense Division, has periodic in-house immigration training for all its staff attorneys on the immigration consequences of criminal convictions. Specifically:

- In 1985, Margaret McManus conducted an office-wide training on the "Immigration Consequences of Criminal Conduct."

- From 1989-present, The Legal Aid Society has had a city-wide training for the new staff attorneys on the immigration consequences of criminal convictions.

- In 1991, 1993, and 1994, The Legal Aid Society had a several-day-long advanced training for lawyers on "The Preparation and Trial of a Narcotics Case," which included a specific lecture on the immigration consequences of drug convictions.

Los Angeles County Public Defender provides in-house training for its staff attorneys every few years on the immigration consequences of criminal convictions. For instance on Jan. 13, 1988, Josie Gonzalez conducted an office-wide training on the "Immigration Consequences of Criminal Convictions for "Amnesty" Applicants and other Immigrants," and on Mar. 30, 1994, Gilbert Lopez conducted an office-wide seminar on the "Immigration Consequences of Criminal Convictions, Criminal Pleas, Diversion and Post-Conviction Remedies."

San Francisco City and County Public Defender has provided an in-house training for all of its staff attorneys every year on the immigration consequences of criminal convictions since 1990.

Professor James Smith, the Directing Attorney of the Immigration Law Clinic of the School of Law of the University of California at Davis, and the Davis Immigration Law Clinic have sponsored an average of 5 training

sessions each academic year and many individual consultations since 1987 for criminal defense counsel on the immigration consequences of crime.

Jay Stansell, while employed at Northwest Immigrants Rights Project in Seattle, Washington, conducted approximately two trainings per year for local defender agencies on the "Immigration Consequences of Crime," highlighting the availability of 212(c) relief for many clients. He also spoke at the following specific CLE trainings:

- Apr. 11, 1992, University of Washington School of Law, "Immigration Consequences of Crime"
- Oct. 21, 1993, Seattle, "Immigration Consequences of Crime," sponsored by Seattle-King County Bar Association
- Jan. 18, 1994, Seattle, "Immigration Consequences of Criminal Convictions," sponsored by Northwest Immigrants Rights Project
- Oct. 21, 1994, Seattle, "Importance of Immigration Considerations when Representing Juvenile Non-citizen Offenders," sponsored by Washington Defenders Association
- Mar. 31, 1995, Seattle, "Firearm Offenses and 212(c) Relief," sponsored by Washington Association of Criminal Defense Lawyers

Norton Tooby is a California attorney who specializes in the representation of non-citizens in criminal courts and the author of many publications on strategies to ameliorate the immigration consequences of convictions. A partial list of CLE seminars he has given to criminal defense lawyers on the immigration effects of criminal convictions follows:

- Sept. 18, 1990, San Francisco, "Post-Conviction Relief and Its Impact on Immigration Cases," sponsored by the Immigrant Legal Resource Center (IRLC) and Golden Gate Law School

- Sept. 25, 1990, San Jose, "Post-Conviction Relief and Its Impact on Immigration Cases," sponsored by ILRC and Golden Gate Law School

- Oct. 5, 1991, San Francisco, "Immigration Consequences of Crimes," sponsored by the ILRC

- Oct. 26, 1991, Davis, CA, "Immigration Consequences of Criminal Offenses," sponsored by the ILRC; State Bar Association; National Lawyers Guild; American Immigration Lawyers Association; and the U.C. Davis Immigration Law Clinic

- Mar. 6, 1993, Davis, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

- Apr. 3, 1993, San Francisco, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

- June 12, 1993, Los Angeles, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

APPENDIX D: INDEX OF DOCUMENTS LODGED WITH THE SUPREME COURT

PROFESSIONAL STANDARDS CITED IN BRIEF

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed.), Standard 14-3.2, commentary (1982)..... L-1

ABA Standards for Criminal Justice, Pleas of Guilty, (3d ed.), Standards 14-1.4 & 14-3.2, commentary (1999)..... L-2

NLADA Performance Guidelines for Criminal Defense Representation, Guideline 6.2, 6.3, commentary (1994)..... L-3

AFFIDAVITS/DECLARATIONS CITED IN BRIEF

Declaration of Cristina C. Arguedas, filed in *Jun Li Tam v. Reno,* No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999..... L-4

Declaration of Katherine A. Brady, filed in *In re Resendiz,* No. S078879 (Cal.) on Jan. 7, 1999..... L-5

Declaration of Nancy L. Clarence, filed in *Jun Li Tam v. Reno,* No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999..... L-6

Declaration of Susan L. Hendricks, filed with *amici curiae* brief of The Legal Aid Society of the City of New York, et al., in *Calcano-Martinez v. INS,* No. 98-4033, 98-4214, 98-4246 (2d Cir.) on Nov. 17, 1999..... L-7

Affidavit of Daniel Kanstroom, filed with *amici curiae* brief of the National Legal Aid and Defender Association & New York State Defenders Association in *Bonhometre v. Reno,* No. 98-12333-NG (D. Mass.) on Feb. 1, 2000..... L-8

Declaration of Larry Kupers, filed in *Jun Li Tam v. Reno*, No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999 ..... L-9

Affidavit of Dennis R. Murphy, filed with *amici curiae* brief of the National Association of Criminal Defense Lawyers & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 on Apr. 30, 1998 ..... L-10

Declaration of James F. Smith, filed in *In re Resendiz*, No. S078879 (Cal.) on Jan. 7, 1999 ..... L-11

Declaration of Norton Tooby, filed in *In re Resendiz*, No. S078879 (Cal.) on Jan. 7, 1999 ..... L-12

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